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Supreme Court of the United States

OCTOBER TERM 1978

78-
No. 759

WAYNE L. KIDWELL, Attorney General of Idaho, and TOM D. MCELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

against

GREAT WESTERN UNITED CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF NEW YORK, JOINED BY ALASKA, AMERICAN SAMOA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VIRGINIA, WEST VIRGINIA AND WISCONSIN, *AMICI CURIAE*

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Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho,

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BRIEF OF THE STATE OF NEW YORK, JOINED BY ALASKA, AMERICAN SAMOA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VIRGINIA, WEST VIRGINIA AND WISCONSIN, *AMICI CURIAE*

Interest of *Amici*

This appeal presents questions of great public interest: whether there was jurisdiction over officials of foreign states and venue over an action challenging the statutes of those foreign states in the Northern District of Texas, and whether the state statutes governing disclosure in take-overs of corporations principally located in those states

are valid under the commerce or supremacy clauses of the Constitution of the United States. These are all questions of first impression which will substantially affect state regulators of business and securities and state officials in defending actions of every sort.

New York has a special interest in this appeal, since the New York Attorney General was an original party defendant as the administrator of the Security Takeover Disclosure Act of New York (New York Business Corporation Law [hereinafter N.Y.B.C.L.] Art. 16, § 1600, et seq. See Statement of the Case at p. 7, *et seq. infra*).

Indeed, the Attorney General of New York had petitioned this Court for a stay pending an application for certiorari to review the District Court's finding of jurisdiction against the Idaho and New York defendants. That petition was denied on May 20, 1977.

While the District Court ultimately dismissed the case against the New York State Attorney General after trial, all of the procedural prejudice of appearing to defend an act of the New York State Legislature in a foreign forum had already been felt. New York's statute had been enjoined in Texas before it had been given an opportunity to defend.

As an Attorney General of a large state and Securities Administrator, Attorney General Abrams will feel the precedential effect of this decision which subjects state officials to a trial on the validity of their statutes in a distant Federal District Court.

The Attorney General and other officials of all 50 states and the territories as well, have an interest in defending statutes and administrative actions in their own states where personal jurisdiction and venue lie and Alaska, American Samoa, Colorado, Connecticut, Florida, Hawaii, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, Oregon, Pennsylvania, South Carolina, Virginia, West Virginia, and Wisconsin have joined in this brief *amici curiae** supporting appellant which is filed with this Court pursuant to Rule 42 of this Court.

New York is also interested in this litigation since it may affect the validity of its Security Takeover Disclosure Statute which is similar, although not identical, to that of Idaho.

At last count (Note: "Securities Law and the Constitution: State Tender Offer Statutes Reconsidered," 88 Yale L.J. 510 [1979]), thirty-six states** have enacted statutes

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* The State of Minnesota has joined in only the jurisdictional and venue points.

** Alaska Stat. §§ 45.57.010-.120 (Supp. 1978); Ark. Stat. Ann. §§ 67-1264 to -1264.14 (Supp. 1977); Colo. Rev. Stat. §§ 11-51.5-101 to 108 (Supp. 1976); Conn. Gen. Stat. §§ 36-347a to -347m (1977); Del. Code Ann. tit. 8, § 203 (Supp. 1977); Fla. Stat. Ann. §§ 517.35 to .36 (Supp. 1978); Ga. Code Ann. §§ 22-1901 to -1915 (1977); Hawaii Rev. Stat. §§ 417E-1 to -15 (1976); Idaho Code §§ 30-1501 to -1513 (Supp. 1978); Act of Sept. 8, 1977, Pub. Act 80-556, Ill. Ann. Stat. ch. 121½, § 137.5-1 (Smith-Hurd Supp. 1978); Ind. Code Ann. §§ 23-2-3-1 to -12 (Burns Supp. 1978); Iowa Uniform Securities Act §§ 502.102, .211-215 (1978), *reprinted in* 1A Blue Sky L. Rep. (CCH) ¶¶ 18,142, 18,161-165; Kan. Stat. Ann. §§ 17-1276 to -1285 (1974); Ky. Rev. Stat. §§ 292.560-.991 (Supp. 1978); La. Rev. Stat. Ann. §§ 51:1500-:1512 (West Supp. 1978); Me. Rev. Stat. Ann. tit. 13, §§ 801-817 (Supp. 1978); Md. Corp. & Ass'ns Code Ann. §§ 11-901 to -908 (Supp. 1977); Mass. Ann. Laws ch. 110C, §§ 1-13 (Michie/Law. Co-op. Supp. 1978); Mich. Comp. Laws Ann. §§ 451.901-.917 (Supp. 1978); Minn. Stat. Ann. §§ 80B.01-.13 (West Supp. 1977); Miss. Code Ann. §§ 75-72-1 to -23 (Supp. 1978); Mo. Take-Over Bid Disclosure Act, 1978 Mo. Laws S.B. No. 820, *reprinted in* 2 Blue Sky L. Rep. (CCH) ¶¶ 28, 201-214; Neb. Rev. Stat. §§ 21-2401 to -2417 (1977); Nev. Rev. Stat. §§ 78.376 to -.3778 (1973); N.H. Rev. Stat. Ann. §§ 421-A:1 to :15 (1977); N.J. Stat. Ann. §§ 49:5-1 to -19 (West Supp. 1978); N.Y. Bus. Corp. Law §§ 1600-1613 (McKinney Supp. 1978); N.C. Gen. Stat. §§ 78B-1 to -11 (Supp. 1977); Ohio Rev. Code Ann. § 1707.041 (Page 1978); 70 Pa. Cons. Stat. Ann. §§ 71-85 (Purdon Supp. 1978); S.D. Comp. Laws Ann. §§ 47-32-1 to -47 (Supp. 1978); Tenn. Code Ann. §§ 48-2101 to -2114 (Supp. 1978); Utah Code Ann. §§ 61-4-1 to -13 (1978); Va. Code §§ 13.1-528 to -541 (1978); Wis. Stat. Ann. §§ 552.01-.25 (West Special Pamphlet 1978); Tex. Administrative Guidelines for Minimum Standards in Tender Offers 065.15.00.100-.800, *reprinted in* 3 Blue Sky L. Rep. (CCH) ¶ 46,615.

which to some extent regulate takeover bids for corporations maintaining certain contacts with the state. These states have an interest in defending the acts of their Legislature which might be affected by this Court's determination. The plaintiff and the Courts below have not limited themselves to attacking the provisions of Idaho's statutes, but have directed their assertions of unconstitutionality at state takeover legislation, in general.

Although on May 20, 1977, New York ultimately determined that it did not have jurisdiction over the proposed takeover, before that time, New York had determined that the provisions of the Idaho statute and the action of the Idaho administrator in issuing the letter of comment were appropriate to protect the interests of the shareholders of Sunshine Mining Company, should it be found to be within New York's jurisdiction. Therefore, New York has a special interest in defending those actions which it has relied on as reasonable.

Questions Presented

The 10 questions over which jurisdiction was noted by this Court are placed in a slightly different order, but their numbers indicate the order of Appellant's Jurisdictional Statement.

A. Was there jurisdiction in the Northern District of Texas over the persons of officials of the State of Idaho or the "Williams Act" claims of the offeror?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

1. Whether due process or federalism principles will allow a federal court in Texas to assert personal jurisdiction over officials of the State of Idaho, one of whom took no action whatsoever and the other of whom acted solely in Idaho in his governmental capacity by enforcing Idaho law, on the theory that the official acts in Idaho had consequences or practical effects in the State of Texas?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

2. Whether a state official acting in his state solely in a governmental capacity by enforcing his own state's laws may be deemed to be "in" or "conducting" business in some other state for purposes of long-arm jurisdiction, state or federal, in the other state?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

3. Whether the doctrine of *Ex parte Young*, which permits suit against a state official under circumstances where the Eleventh Amendment would bar a suit against the state itself, may constitutionally be extended to subject Idaho officials acting solely within their governmental capacity in Idaho to suit in a court sited in Texas?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

4. Whether enforcement by a state official in Idaho of Idaho law which allegedly conflicts with a portion of the Securities Exchange Act of 1934 constitutes a "violation" of said Act for purposes of federal court jurisdiction thereunder when no specific proscription of thereof has been breached?

The Courts below answered "yes." Appellant and *amici* contend that the answer should be "no."

10. Whether a tender offeror has standing to maintain an action under the Williams Act amendments to the Securities Exchange Act of 1934 to challenge the constitutionality of state corporate takeover laws?

The Courts below have answered "yes." Appellants and *amici* contend the answer should be "no."

B. Was there venue in the Northern District of Texas over a claim by a nationwide corporation with its corporate headquarters currently located in Texas that Idaho state officials were unconstitutionally interfering with its attempt to take over another nationwide corporation with its principal place of business permanently located in Idaho?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

5. Whether, in an action brought in Texas by a Texas resident against Idaho officials to invalidate an Idaho statutory scheme on the ground that it conflicts with or is preempted by the Securities Exchange Act of 1934, venue is proper in Texas either because (a) under the jurisdiction portion of the Exchange Act a "violation" occurred in Texas or (b) under general federal venue statutes the claim against the Idaho officials arose in Texas, under a theory that the plaintiff was affected in Texas by the acts in Idaho of an Idaho official in enforcing the Idaho law?

The Courts below answered "yes" under the Securities Exchange Act. The Circuit Court answered "yes", but the District Court answered "no", under general federal venue provisions. Appellants and *amici* contend that the answer should be "no" in all respects.

C. Has Congress preempted the regulation of corporate takeovers?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

6. Whether Congress has reserved to the States, under Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), the power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934?

The Courts below answered "no." Appellants and *amici* contend that the answer should be "yes."

7. Whether, independently of Section 28(a), the States have the inherent power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934?

The Courts below answered "no." Appellants and *amici* contend that the answer should be "yes."

D. Did the Idaho statute on its face or the aborted attempts at enforcement by Idaho officials unduly burden interstate commerce?

The Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

8. Whether a federal court may weigh the benefits of a state corporate takeover law against its alleged effect upon interstate commerce?

By implication, the Courts below answered "yes." Appellants and *amici* contend that the answer should be "no."

9. Whether, independently of Section 28(a), state corporate takeover laws constitute an undue burden on interstate commerce?

The Courts below answered "yes." Appellants and *amici* contend the answer should be "no."

Statement of the Case

Great Western United Prepares Its Takeover Bid for Control of Sunshine Mining Company

In the spring of 1977, the time when this takeover bid was launched, Great Western United (GWU) was a publicly owned conglomerate Corporation organized in Dela-

ware whose stock was traded on the New York Stock Exchange (PARISH, 130-132*). It had nationwide operations with substantial assets in Colorado and Nebraska (SEC form 10-K, GWU, pp. 26-29 [1975]). In December 1974, it had been taken over by two brothers, Bunker and Herbert Hunt who, between them, owned 65% of the stock. The year before, the corporate headquarters had been moved from Denver, Colorado, to Dallas, Texas, where the Hunts resided (37-54, 130-132, PARISH T 78-79, 4/18/77).

Sunshine Mining Company (Sunshine) also was a publicly owned conglomerate traded on the New York Stock Exchange. It was organized in the State of Washington and had corporate headquarters in Idaho and New York. Its major assets were real property holdings and mineral rights in the State of Idaho, particularly the Sunshine Mine, the largest silver mine in the United States. Sunshine's approximately 5,800,000 outstanding shares were held by approximately 30,000 shareholders (SEC Form 10K Sunshine [1975]).

Catastrophies had plagued that mine in the past two years. A devastating fire had claimed the lives of 90 miners and then a year-long strike (March 11, 1976-March 13, 1977), had closed it (40; SEC Form 10K Sunshine, pp. 9-10 [1975]). In December 1976, Hecla and Silver Dollar Mining Companies had waged an unsuccessful proxy fight for control of Sunshine. When that failed, they sold their 334,070 shares of Sunshine stock to GWU in an agreement in which GWU promised to reimburse them $200,000 for the cost of that fight from the Sunshine Treasury, if GWU should gain control of Sunshine (43-45).

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* Unless otherwise indicated number in parentheses refer to pages of the appendix. Items in the record not in the appendix are described. Transcript citations refer to the witness' name followed by a page in the appendix. Transcript citations not in the appendix refer to the witness, "T", transcript pages and date.

On March 18, 1977, Sunshine's common stock was selling for $14.25 per share (41). GWU allegedly offered $16.75 a share for two million shares if the Directors of Sunshine would recommend the offer to the shareholders. Sunshine did not respond during the prescribed time, and three days later, on March 21, GWU announced a proposed "tender offer" for two million Sunshine shares at $15.75 per share (BOSWELL, T 195, 5/24/77). That announcement was made in a press release by a New York public relations firm which showed that the tender offer was to be handled by an executive vice-president of GWU located in New York and was to be managed by the New York office of Kuhn-Loeb, Inc. (Notice of Proposed Offer to Purchase [5/21/77]).

On that same date it filed from New York a Schedule 13D with the Securities Exchange Commission supposedly complying with the Williams Act amendments (15 U.S.C. §§ 78l[i], 78m[d]-[e], 78n[d]-[f] [1970]) to the Securities Exchange Act of 1934. The Commission neither processes nor evaluates cash tender offers; it is a repository for disclosure. As a practical matter, enforcement of the disclosure requirements of the Williams Act is left to the federal courts in suits brought by unfriendly target companies (WHEAT T 270, 5/24/77). In its 13D statement, GWU stated that it was complying with the Idaho Corporate Takeover Law (Idaho Code §§ 30-1501-1513).

On that same day, March 21, GWU filed from New York an information statement with appellant McEldowney, Director of the Idaho Department of Finance, purporting to comply with the Idaho Corporate Takeover Law (BOSWELL T 143, 5/23/77).

Meanwhile, also on March 21, New York counsel for GWU, Skadden, Arps, Slate, Meagher and Flom, filed with the Attorney General of the State of New York, a brief, contending that Sunshine did not have a presence in New York sufficient to justify the exercise of jurisdiction under New York's Security Takeover Statute (STROM

117-118). This submission was immediately followed by telephone requests for a decision from the Attorney General as to whether or not New York would exercise jurisdiction (STROM 118-120).

It is undisputed that New York never took any action in exercise of jurisdiction over this tender offer. It is undisputed that neither the Attorney General nor Orestes J. Mihaly, Chief of the Securities Bureau and Securities Administrator for New York, had ever made any statement suggesting that New York would exercise jurisdiction over this offer (118, STROM T 22, 34, 4/18/77). It was plaintiffs' position that in a March 24, 1977 phone call Martin Weber, Special Deputy Attorney General, gave his opinion to Milton G. Strom, a member of the Skadden, Arps firm in New York, that New York was leaning toward jurisdiction over the tender offer (STROM 118-119).

The Idaho Administrator Asks Some Questions.

GWU's information was the first one ever filed under the Idaho statute and the rules promulgated to enforce it (BAPTIE T 381, 5/24/77). Melvin J. Baptie, charged with administering that statute under appellant McEldowney, took the registration statement home to avoid the phone calls which were inundating his office. In order to fulfill his duty of requiring full disclosure for the benefit of Sunshine shareholders and complying with GWU's understandable desire for speedy review, he prepared a letter of comment on March 25, which was his work alone (BAPTIE T 399-400, 5/24/77). Appellant McEldowney signed the accompanying order staying the 20-day waiting period until the statute was complied with (86-87).

Baptie's letter (77-85) requested:

(1) that missing portions of the schedule 13D be filed;

(2) disclosure of litigation between Sunshine and its Shareholders Committee and explanation of certain statements in that regard be explained;

(3) disclosure of information and reports by GWU, Hecla and Silver Dollar as to Sunshine's mining operations;

(4) correction of misstatements as to the effect of Idaho law on shareholders residing elsewhere;

(5) disclosure of facts about the offeror such as its stock, debts, and principal properties required by Idaho's rules and not supplied by GWU;

(6) disclosure of details of plans to recapitalize GWU and to dispose of one of its subsidiaries;

(7) disclosure of plans to repay GWU's loan of cash to purchase Sunshine shares, although Baptie pledged to keep the identity of the bank confidential;

(8) disclosure of GWU's definition of working control of Sunshine;

(9) disclosure of any working or financial agreements with Hecla, Silver Dollar or the Shareholders Committee;

(10) elimination of the use of a phrase indicating a "risk" to shareholders, if this offer were to purchase all shares;

(11) disclosure of the effect of issuance or sale of all of Sunshine's authorized, but unissued, stock;

(12) disclosure of the effect of a sale of Sunshine's subsidiaries on stockholders;

(13) response to a comment that the planned reimbursement of proxy fight expenses to Hecla and Silver Dollar may violate the Idaho Code provisions making it illegal to offer a higher price to controlling stockholders than is paid to others.

The District Court found that Baptie's letter was prepared independently and not influenced by Sunshine in any way (439 F. Supp. at 424 n. 4). All requests for disclosure relate to matters well within GWU's control and which a prudent shareholder should know before he decides whether to sell his stock on the open market, to hold it or to tender it for purchase in whole or prorated part by the offeror.

The letter and McEldowney's order were teletyped to GWU's Dallas Attorney, Steven C. Metzger, as they had requested on March 25, four days after filing (292; BAPTIE T 405, 5/24/77; BOSWELL T 148-149, 5/23/77). Baptie had indicated by telephone that he would make every effort to speed the processing of the filing, including scheduling a prompt hearing. He received no response to his letter of comment (BOSWELL T 156, 5/23/77).

A Texas District Judge Restrains the Operation of Statutes of Idaho, New York and Maryland.

On March 28, 1977, counsel for the Idaho defendants was informed by an outsider that GWU was seeking an *ex parte* temporary restraining order against them before the Hon. Robert Hill, District Judge of the United States District Court for the Northern District of Texas. After repeated phone calls to Judge Hill's chambers, they received permission to be heard on that application (BAPTIE T 405, 5/24/77). The Court scheduled argument for 9 a.m., March 30, in Dallas. Thereafter, the New York Attorney General and the Maryland Attorney General were informed of this application and subsequently received copies of the complaint and the application for the temporary restraining order (159-60).

On March 30th, two representatives of the Idaho Attorney General's office and one representative from the Maryland Attorney General's office appeared in the United States District Court for the Northern District of Texas

and opposed the issuance of a temporary restraining order against their state statutes on the basis that there was no personal jurisdiction over the defendants and that venue was improperly laid in the Northern District of Texas. The New York Attorney General sent a telegram objecting to jurisdiction and venue. However, on April 1, Judge Hill granted the motion enjoining the operation of the Idaho, Maryland and New York statutes and ordered an expedited consolidated trial of the preliminary and permanent injunction to be held on April 8, in Dallas. The New York Attorney General was informed that such an order had been entered but a copy never was received from the Court nor from the plaintiffs.

The District Court in Idaho Stays the Tender Offer

Meanwhile, on April 1, Sunshine Mining Corporation instituted an action against GWU in the United States District Court for Idaho alleging that the material filed by GWU failed to satisfy the requirements of the federal Williams Act. *Sunshine Mining Co.* v. *Great Western United* (Civil #77-1064). In that action plaintiff was represented by its New York counsel, Skadden, Arps, Slate, Meagher and Flom. On April 5, that Court issued a temporary restraining order against GWU's commencement of the proposed tender offer. That temporary restraining order was extended on April 8, and parties in the United States District Court for the Northern District of Texas on that day received notice of the order at 5:30 p.m., obviating the effect of any temporary relief which might have been ordered by the District Court in Texas. On April 22, the District Court for Idaho denied a preliminary injunction. On October 5, 1977, the suit was settled and dismissed.

The settlement provided that GWU's successor Hunt International Resources Co. (HIRCO) would offer $15 a share for a maximum of 1,275,000 shares. Sunshine Directors did not approve or recommend the tender offer.

HIRCO agreed to exchange securities or notes worth $15 per share for the balance of the 2 million shares it had originally sought. HIRCO's wholly owned subsidiary, Western Investment was formed to own the 28% of Sunshine purchased in the tender offer. George Michael Boswell, former Executive Vice President of GWU, was made President of Sunshine.

On December 4, 1978 Sunshine filed a complaint in the District Court in Idaho. *Sunshine Mining Co.* v. *Hunt International Resources Co.* (No. Cir. 78, 1323), alleging that HIRCO and GWU had violated the settlement agreement, committed fraud under § 10b and 10b-5 of the 1934 Act, and for failure to comply with the Williams Act. HIRCO has moved to dismiss the suit, contending, *inter alia,* that there was no jurisdiction and venue over it and that Texas was the appropriate forum. Those motions are *sub judice.* Meanwhile HIRCO brought suit against Sunshine in a state court in Dallas County, Texas, 14th Judicial District. *Hunt International Resources Corp.* v. *Sunshine Mining Co.* (#78-18126-A). That suit is also still pending.

Therefore, the tender offer at issue in this case which was not finally approved by the defendants is still under attack as violating the federal statute.

The Fifth Circuit Requires Preliminary Determination of Jurisdiction and Venue.

After the District Court's restraining order had been issued on March 30, counsel for Idaho and Maryland filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. On the following day, they sought a stay of the temporary restraining order. No stay was granted but a hearing on the appeal was set for April 5.

Counsel for GWU and for the Idaho and New York defendants appeared in the United States Court of Appeals for the Fifth Circuit on April 5. The Court's order was announced from the Bench and was filed the following day. It stayed the order of the Northern District of Texas and directed that the Court to consider the issues of jurisdiction and venue, entering findings of fact and conclusions of law on those issues before consideration of the merits of the complaint. It stated that because the "proceeding involves novel and difficult issues which had broad impact upon federalism . . . should the district court determine that it has jurisdiction and venue, it should consider certification of this determination under 28 U.S.C. § 1292(b) before trial on the merits" (COLEMAN, GODBOLD and CLARK, JJ) (34-35).

The Trial Begins and Jurisdiction and Venue Are Found.

On April 8, counsel for all defendants appeared in the United States District Court for the Northern District of Texas. All defendants moved to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure because of lack of personal jurisdiction and improper venue. The New York and Maryland defendants had claimed that no case or controversy existed between plaintiff and them. The New York defendant also moved in the alternative for a change of venue because of inconvenience to parties and witnesses pursuant to 28 U.S.C. § 1404(a). Idaho and Maryland joined in that request.

Over the objections of defendants the Court permitted plaintiff to introduce testimony which purportedly touched on plaintiff's theory of jurisdiction and venue but which concededly involved the merits. For example, *Professor Leon Lebowitz,* Professor of Law at the University of Texas, testified to his activities as a member of the State Bar relating to consideration of a possible state tender offer law in Texas (LEBOWITZ 151-155). At that time, Texas had no law regulating tender offers, but before the trial was over, a rule to the same effect was

adopted by the Securities Commissioner. Tex. Administrative Guidelines for Minimum Standards in Tender Offers, 065.15.00.100-.800, 3 Blue Sky L. Rep. (CCH) ¶ 46,615. In any event, no connection was made between his testimony and the issues of jurisdiction and venue. Similarly, *John S. Guest,* a member of the firm of Kuhn, Loeb and Company in New York City, which was to manage the receipt of Sunshine Mining Company securities on behalf of GWU also testified. Despite his interest, he gave his opinion that state tender offer laws inconvenienced arbitrageurs ("a group of dealers acting for their own account. . . ." [GUEST 145]) because they may delay the consummation of the tender offer (GUEST 137-148). The relevance of that testimony to findings of jurisdiction and venue also was not shown. The other witnesses who testified were *Milton G. Strom, Esq.,* a member of Skadden, Arps, Slate, Meagher and Flom, the New York based attorneys for plaintiff (116-124); *Drew R. Heard,* a member of Shank, Irwin, Conant, Williamson and Grevelle, plaintiff's Dallas law firm (T 15-18, 4/8/77) and *James R. Parish,* Vice-President and Treasurer of GWU (63-87). None of this testimony was referred to by the Court in its order, although the Court stated that "these preliminary matters ["issues of jurisdiction and venue"] and the merits of the action are largely intertwined."

On April 21, 1977, Judge Hill issued an order, findings of fact and conclusion of law, holding that he had personal jurisdiction over the defendants (all state officials residing more than a thousand miles from the Court) on the basis of the Texas long arm statute and § 27 of the 1934 Act, and that venue was properly laid in Texas because the New York and Idaho defendants had allegedly committed acts in Texas which violated the Williams Act. Subject matter jurisdiction was found to exist under 28 U.S.C. §§ 1331, 1332, 1337 and § 27 of the 1934 Act as a suit "'. . . to enforce [a] duty or liability created by [the 1934 Act]'." (¶¶ 5-6).

The Texas District Court saw a case or controversy with the Idaho and New York defendants as to the validity of their laws. The Court held that the March 25th intrastate New York telephone call and New York's intrastate subpoena to *Sunshine* to determine the nature of *Sunshine's* New York place of business and its New York assets were the basis of a finding that "New York officials have arrived at the working position that they have jurisdiction . . ." and that "[t]hey are proceeding with an investigation on their own volition" (¶ 4). After two appearances in Texas, the District Court ultimately found that there was no case or controversy with the Maryland defendants because they "have not expressed any opinion on their jurisdiction over the proposed tender offer . . ." (¶ 5).

Judge Hill found that GWU would suffer an economic hardship if the New York and Idaho statutes were enforced, ". . . lock[ing] up" their funds ". . . for the duration of the State proceedings" and ". . . the delay occasioned by the enforcement of these state takeover laws will significantly jeopardize the success of the tender offer" (¶ 6).

Although the District Court found that GWU's suit was one to enforce a duty or liability under the 1934 Act, and that the Idaho and New York defendants had committed acts in Texas allegedly in "violation" of the Williams Act, it conceded that the enforcement provisions of the 1934 Act could not be constitutionally applied to defendants because they were acting in their official capacity. The Court said that prospective relief against the enforcement of the State laws was all that was permitted under *Edelman* v. *Jordan,* 415 U.S. 664, 667-8 (1974) (¶ 7).

Concluding that the Idaho and New York statutes had an extraterritorial effect which was more than incidental, the Court held that these statutes "substantially impinge on the freedom to contract of Texas residents" (¶ 18).

This alleged extraterritorial effect, the Court held, constituted doing business in Texas because the Court gave the Texas long-arm statute "maximum constitutional limits" (¶ 19). Without discussing the constitutional limit of state sovereignty, the Court found that there were minimum contacts with Texas and that it was fair and reasonable to require the defendants to come into the State to defend the action. This conclusion was reached although the Court also held that the claim against Idaho arose only in Idaho and that against New York only in New York (¶ 20). That extraterritorial effect was also held to constitute acts in Texas which purportedly were a violation of an unspecified portion of the Williams Act (¶ 22).

The District Court did not rule on the application for a change of venue for the convenience of the parties and witnesses under 28 U.S.C. § 1404(a). There was no reference to relative convenience of the parties, to the severe inconvenience of all the defendants and their witnesses, the inconvenience of some of plaintiff's witnesses and the lack of inconvenience to plaintiff if Idaho and New York forums were chosen.

Since the only basis for venue in the Northern District of Texas was the national venue provision of § 27 of the 1934 Act, the claim of burdening interstate commerce could not be brought there. However, the District Judge further exercised his discretion to require defendants to defend their state statutes in his Court by determining that pendent jurisdiction over the interstate commerce claim existed (¶ 23).

Finally, the District Court rejected the suggestion of the United States Court of Appeals that it certify the question of jurisdiction and venue. It suggested that one day probably would be sufficient for the trial and indicated that the defendants who had gone to the Court of Appeals for relief from the burden of a trial on the

merits outside their states and received that relief had been "obstinan[t]" in not submitting the validity of their statutes to the District Court in Texas (Order p. 2).

Preliminary Review of Jurisdiction and Venue Are Denied.

On the day they received the decision, the Idaho defendants served their petitions for mandamus and/or prohibition and for leave to appeal under 28 U.S.C. § 1291 and also filed their notice of appeal on that date.

The Idaho petition for mandamus and/or prohibition sought direction that the District Court dismiss the suit and nullify its findings of fact and conclusions of law. The New York petition for mandamus sought a direction to dismiss the suit or in the alternative, to certify the questions of jurisdiction and venue pursuant to 1292(b), or in the alternative, to transfer the action to the United States District Court for the Southern District of New York. It also joined in the applications made on behalf of the Idaho defendants.

All petitioners appealed and petitioned for leave to appeal on the ground that appeal was proper since it would effectuate ". . . the same policy Congress sought to promote in [28 U.S.C.] § 1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. § 1291 . . .". The Court of Appeals had already directed the District Court to consider certifying the questions of jurisdiction and venue under § 1292(b).

On May 12, 1977, the United States Court of Appeals (COLEMAN, GODBOLD, TJOFLAT, CJJ.) denied the petition without opinion, stating that the Court assumed a prompt trial on the merits would take place. It did not rule on the New York defendant's application for a stay pending the determination of certiorari which was renewed on May 13, 1977. On May 18, 1977, Judge Godbold denied the stay.

Defendant Lefkowitz's application to this Court for a stay of proceedings in the Northern District pending an expedited petition for certiorari was denied on May 20, 1977 by Mr. Justice Powell and the defendants proceeded to trial.

On that same day, May 20, Orestes J. Mihaly, Assistant Attorney General in charge of the Securities Bureau, informed GWU that it need not register its proposed offer to purchase Sunshine securities in New York, primarily because ". . . the assets of the target company within the State . . . are not substantial within the meaning of [NYBCL § 1601(a)]" (439 F.Supp. at 428).

The Validity of the Idaho Takeover Statute Is Tried in Texas.

On May 23 and 24, 1977, the validity of the Idaho Corporate Takeover statute was tried before Judge Hill. The plaintiff introduced the Sunshine shareholders list. (T 25-27, 5/23/77), a deposition to show that the chief executive officer of Sunshine resided in New York and that Anchor Post, a subsidiary of Sunshine, owned some property in Texas (T 31-34, 5/23/77).

Plaintiff also called *Jeffrey B. Bartell,* Commissioner of Securities for Wisconsin and administrator of that State's Takeover statute since 1972. Only one unfriendly offer had been filed in Wisconsin in that time (180). He testified that the purpose of the Williams Act was to protect the shareholders of the target company from fraud and to require for their benefit disclosure of all material facts and prohibit omission of those facts. He stated that the state statutes, in general, were designed to achieve the same purpose as the Williams Act (222-224). The Wisconsin statute, he said, was almost identical to Idaho's (186-187). It was also his opinion that the Williams Act did not give sufficient protection to shareholders (214-215, 222-225).

He also noted that the North American Securities Administrators' Association was making efforts at cooperation and uniformity among the States in regarding takeovers. He knew of no instance where states had asserted conflicting jurisdiction and knew that States had deferred to a State with a superior interest (193, 216, 217).

Bartell was permitted to express his opinion that as a State Administrator he would not object if Congress were to preempt the state statutes, as long as the federal statute provided more protection for shareholders including more time for the shareholder and target company management to decide on the offer, and provided for review by the Securities Exchange Commission (SEC) before the offer is made (221-222). He noted that the number of takeovers and state statutes regulating them have increased each year, so that offerors have learned to live with the state statutes and any deterrence of offers which such statutes might have, has been diminished (198).

GWU then introduced the findings of fact of the Idaho District Court in the *Sunshine Mining Company* v. *Great Western United,* in denying a preliminary injunction to prove that it was now complying with the Williams Act disclosure requirements. It was thus relying on the decision of the Court to which it had deliberately avoided submitting itself—a court which would have had undisputed jurisdiction and venue over this action.

The Idaho defendants called *George Michael Boswell,* Executive Vice-President of GWU, to testify as to the facts he swore to in the complaint regarding the threat he had alleged was posed by the statutes of Idaho, New York and Maryland. He admitted that after a few hours, and without negotiation, GWU determined not to respond to Idaho's letter of comment. Among other things, Mr. Boswell testified, "We just reached a determination that

we might not ever be able to adequately respond to [Baptie's] letter" (BOSWELL T 156, 5/23/77).*

The defendants introduced the expert testimony of *Frank Wheat,* former member of the Securities Exchange Commission and champion of shareholders rights. He distinguished the impact on management and shareholders, of the three methods by which control of a corporation may be obtained; the exchange offer, the proxy contest and the cash tender offer (247-254). He characterized the exchange offer and the proxy contest as areas which are highly regulated by the SEC and, thus, giving management a protracted period of time in which to evaluate the merits of the proposed takeover. The cash tender offer, however, poses a strikingly different situation in that a shareholder (and management) must make a critical investment decision in a very short period of time (248-252).

The Williams Act was designed to fill a void of regulation where abuses of the cash tender offer ("blitzkrieging") were taking place (255-256). Mr. Wheat testified that the Williams Act should not be considered as completely filling this regulatory void. Specifically, he stated that: "[The Williams Act] was a first step . . . I certainly did not at the time consider it to be a final solution. I'm not sure anybody did" (258-259). In fact, when questioned whether the material filed under the Williams Act is reviewed by the SEC, Mr. Wheat stated emphatically that there is no such review. Contrasting the tender offer with proxy contests and exchange offers, Mr. Wheat observed as follows: "If you have a registration statement [or a] proxy statement which is part of that registration statement in connection with a merger or a sale of assets, that's reviewed

* Mr. Boswell became President of Sunshine after this takeover was effectuated and Western Investment had obtained 28% of the stock of Sunshine. Among the facts sought to be probed by the Idaho defendants in Baptie's letter of comment are ones at issue in Sunshine's current suit against HIRCO.

carefully by the SEC before it is permitted to become effective. [In a] proxy contest situation, there is some review by the SEC of the proxy materials" (256-257).

In order to compensate for this lack of review by the SEC, states have enacted takeover statutes. Mr. Wheat commented on their effect as follows: "[The state statutes] do four things. First of all, they require larger, longer period [sic] of time during which the tender offer must be publicized and open, which permits the management and Board of Directors of the target company to react, to obtain advice and information and to get that information out to stockholders. It also permits the introduction into the bidding of additional bids. They require additional disclosure going beyond that required by the Williams Act . . . they introduce the administrative process . . . by requiring an administrative review at the state level prior to the time the tender offer . . . becomes effective . . . and they include . . . a provision which, in essence, requires all shareholders of the target company to be treated equal." (257-259).

He discounted the possibility of conflict among jurisdictions in regulating takeovers (WHEAT T 311, 5/24/77) and explained the importance of administrative review before the offer. He stated "I think some administrative review is desirable. In the absence of administrative review, you're simply relegated to courts. Everybody is suing everybody else, claiming that the disclosures are inadequate, and the courts in this country are adequately burdened as it is. The administrative review process has worked very well in the case of other aspects of the securities transactions and the securities markets, and what the state statutes have done is to introduce an element of administrative review of the disclosure which was not present." (261-263).

William Chatlos, a principal of Georgeson and Company which solicits proxies, including tender offers, engages in

management consultation, especially with regard to relations with investors. Chatlos is in charge of these investor relations. He also has written and lectured widely on takeovers. Georgeson had participated for either the target company or the offeror in virtually all the unfriendly tender offers which had occurred since the passage of the Williams Act in 1970 (280-281).

He explained the emergence of the cash tender offer as a result of market conditions with cash available and price-earning ratios low.

He studied all hostile tender offers between the end of 1974 through the end of 1976. He found that in virtually all those situations, the target company did not survive (T 328, 5/24/77). Only 3 of 50 in 1976 did (T 328, 5/24/77). He said there was no difference if a state takeover statute applied or if it did not, as to protection of incumbent management (285-287). But he found those statutes very significant because they usually provided for more time in which an auction can devolop (284-285). In all takeovers, in which management of the target company did not survive, the stockholder who tendered received more for his share than the original offer—a total in two years of $150 million (281-282).

Chatlos regarded the secrecy and speed of the tender offer as very harmful, even to the shareholder who is willing to trade, since more time encourages a corporate auction market (284-288). Prudent management needs time to evaluate the company in an orderly meticulous way before it enters the bidding (282-284). He emphasized that the only control of the economic opportunism in takeovers is the existence of the state statutes and particularly the time they provide.

Chatlos indicated that it was an anomaly that SEC rules require at least 2 months to call a special meeting of the stockholders to liquidate a company but for "killing off a company, eight days is plenty of time" (354). Thus,

although the management of Micro Dot thought liquidation would be more profitable for the stockholders than takeover, it had to accede to the latter.

Chatlos noted that many, if not most, individual shareholders are not actively in the market buying, selling or trading; but instead hold on to their past purchases, having faith in the management of their company.

Idaho also introduced the testimony of *Melvin J. Baptie* their Deputy Administrator of Securities (T 380-423, 5/24/77) and in rebuttal, GWU introduced the testimony of *Stephen Metzger*, one of their attorneys who had dealt with Baptie (e.g., T. 437-441).

The District Court Invalidates the Idaho Law

On September 2, 1977, the District Court rendered its decision which declared the Idaho Corporate Takeover Law unconstitutional and enjoined its enforcement.

Judge Hill reiterated his holdings on jurisdiction and venue, but found that the cause of action against New York was moot because New York had decided that the filing requirements of its Security Takeover Disclosure Statute did not apply to a takeover of Sunshine. 439 F. Supp. at 428.

Judge Hill found that the Idaho Law was pre-empted by the Williams Act because the difference between the federal and state approach constituted an impermissible conflict. (*Id.* at 436-437). The Court found that Idaho law restricted the offeror whose rights it believed were affirmatively protected by the Williams Act (*Id.*). The differences which offended federal supremacy were the Idaho requirement that the offeror describe its business; that a hearing in Idaho could delay a tender offer as long as 30 days or, under special circumstances, even longer; and that registration and approval requirements of the Idaho Law do not apply if the Directors of the target company approve the offer. *Id.* The Court conceded that Congress had not

occupied the field of securities regulation nor was its interest so dominant that any state statute would be precluded. (*Id.* at 435).

Judge Hill also found the Idaho Law to unconstitutionally burden interstate commerce on several grounds. (*Id.* at 438-439). He thought that the Law expressed no legitimate local purpose (*Id.* at 438):

> "The ultimate purpose of the Idaho statute is to thwart tender offers and thereby prevent possible removal of the target company or its management, the closing of plants and related effects on the state's economy. But a state may not legitimate its regulation of interstate commerce by asserting this type of interest."

The Court held that the law "purposely precludes Great Western's making a tender offer anywhere" and that that was more than an incidental effect on interstate commerce. *Id.* at 439. He also stated that interstate commerce was burdened by the existence of "the state takeover statutes" because he believed an offeror has to comply with so many it discourages tender offers. (*Id.*).

The Court of Appeals Affirms the Texas District Court's Exercise of Jurisdiction and Venue and the Finding that the Idaho Law was Invalid

On August 10, 1978, the United States Court of Appeals for the Fifth Circuit affirmed the Texas District Court's decision; but it differed in its reasoning in some respects.

Both Courts below based their exercise of jurisdiction and venue on the finding that the defendants had a presence in Texas, had relied on the benefits of a Texas forum, had done business in Texas and had committed acts which violated the Securities Exchange Act of 1934.

The District Court had rested its finding partly on Idaho's supposed effect on some (489 of 33,000) shareholders of

Sunshine who resided in Texas. 439 F. Supp. at 424, 431. The Court of Appeals rested its findings solely on the effect of Idaho's Law on GWU. The Court of Appeals, unlike the District Court, seemed to regard GWU as being located exclusively in Dallas where its Directors resided. 577 F.2d at 1267-1268, 1273.

The District Court had held there was no venue under the general venue provisions of 28 U.S.C. § 1391(b) because a cause of action may arise in only one district, the weight of the contacts was in Idaho and the Court found that GWU was injured in "all other federal judicial districts, as well as in the Northern District of Texas." 439 F. Supp. at 433. The Court of Appeals (577 F.2d at 1273), found venue under § 1391(b) even if the claim could only be brought in one district because (577 F.2d at 1273):

> "The offer was initiated in Dallas, Texas. If there is a single place where the allegedly invalid restraint occurred, that place is Dallas. Although the result of Idaho's regulation was that Great Western could not make an offer to Sunshine shareholders who reside in districts throughout the country, the place of restraint, and thus the place where Idaho officials injured Great Western, was in Dallas."
>
> [citations omitted]

The Court of Appeals referred to this Court's decision in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 as authoritatively interpreting the Williams Act, although it had been ignored by the District Court. It nonetheless found that any additional advantage to the target company destroys the Williams Act "market approach" to regulating tender offers and therefore conflicts with the federal law. 577 F. 2d at 1256.

The Court of Appeals said the District Court was wrong in analyzing the State Legislature's motives, but it found

Idaho as a small state to have only a remote interest in protecting shareholders because so few of them live there. Despite the location of Sunshine in Idaho, the Court thought it only a coincidence that as many as 2% of Sunshine's shareholders were Idahoans. 577 F. 2d at 1283.

The Court also found that the appeal was not moot despite the fact that the tender offer had been consummated. Failure to comply with Idaho law still might have consequences, it reasoned. *Id.* at 1264-1265.

Judge Godbold dissented on the ground that there was no personal jurisdiction over the defendants. He stated that Texas had no interest in exercising jurisdiction over Idaho public officials. (*Id.* at 1290); that the defendants had not purposely availed themselves of the benefits and protection of the laws of Texas (*Id.* at 1289), and that the defendants were denied due process of law because the nature and quality of their contacts with Texas were too insubstantial to warrant the exercise of jurisdiction in that State. Judge Godbold criticized the majority's view that the effect of an Idaho law in Texas was a valid basis for personal jurisdiction. He noted that the potential widespread application of that doctrine belied the majority's claim that it would not affect other cases. (*Id.* at 1291). Judge Godbold also disagreed that § 27 of the Securities Exchange Act of 1934 conferred subject matter jurisdiction over the action.

Although he agreed with the majority on the other issues, he dissented because (*Id.* at 1296):

> "Jurisdiction and venue in the Northern District of Texas have been dubious, and fought over, in this case from the beginning. These threshold issues should not be submerged in this court in a rush to the merits, by the confecting of new and strained theories of jurisdiction and venue that will create new and vexing national and state problems and diminish the strength of the merits decision."

Summary of Argument

In order to sustain the decision of the District Court, the Fifth Circuit Court of Appeals had to make six separate holdings on jurisdiction and venue, none of which had any direct precedent and all of which will affect proceedings in the federal courts in the future. They will particularly burden the States in defending their statutes and officials outside their borders.

The Circuit Court for the first time held that State officials charged with enforcing a state statute alleged to be unconstitutional must be regarded by federal courts as private persons pursuing private business.

It found for the first time that service on the Secretary of State of the forum state, constitutionally subjected the officials of other states to jurisdiction there.

It found for the first time that a suit alleging that a state statute conflicted with the Securities Exchange Act of 1934 was a suit authorized by § 27 of that Act and that a state regulator of securities could be sued under it.

It found for the first time that a state regulator charged with enforcing a state statute conflicting with the Act was subject to suit as a "violator" and that venue could be placed wherever his "violation" had an effect.

It found for the first time that a complaint by a multistate corporation against a state regulator arises only where the executive offices of that corporation are located, even if the action involves out-of-state business in the state where the defendant resides.

It found for the first time that a corporation proposing to make a tender offer may seek the protection of the Williams Act Amendments to the Securities Exchange Act against a party not governed by that Act.

The Constitution, statutes, rules and case law were interpreted in that unexpected way so as to find jurisdiction

and venue in the State of Texas over Idaho officials doing the work of their State within its own borders. The law was manipulated to provide a Texas forum when an appropriate convenient one in Idaho was available. This was also to accommodate a multistate corporation doing business in Idaho in order to allow it to sue where its executive offices are located.

These findings are unjustified by the language of the statutes interpreted. They offend basic principles of comity in our federal system and the rights of the individual defendants to due process of law.

The Court's purpose in stretching the law of jurisdiction and venue was to review and invalidate for the first time a state statute regulating tender offers. Tender offers like GWU's are a relatively new mechanism for seizing control of a corporation. A tender offer is a public offer by an individual company or group (the offeror) to acquire a block of securities of a publicly held corporation (the target company). Idaho's law applies if the target company has its principal place of business and substantial assets in Idaho (Idaho Code § 30-1501[6]).

The Idaho statute and appellant McEldowney's attempt to enforce it were directed at serious problems which Idaho has a local interest in alleviating. The purpose of tender offers, in general, and GWU's offer for Sunshine shares, in particular, is to obtain control of a corporation. In this case, the corporation to be taken over had substantial assets in Idaho including control of precious natural resources. Idaho has a substantial interest in providing for an orderly restructuring of that corporation and to insure that its owners, the shareholders, be provided with information to evaluate the offer to determine whether to tender their shares, hold them or dispose of them on the market.

The Idaho statute complements the Williams Act amendments to the Securities Exchange Act which has the same purpose. Both require the offeror to disclose information to aid the shareholder in making this important decision,

but under federal law there is no administrative review to secure compliance. Furthermore, the current SEC rules would allow a tender offer to be complete within 10 days, unless the target company succeeds in obtaining judicial intervention. The Idaho statute provides review of disclosure by a neutral public administrator before the offer takes effect.

Neither the Idaho statute nor the aborted attempt at enforcing it conflicted with the federal statute. Congress in § 28 of the 1934 Act has expressed a permissive posture with regard to State securities laws. The Williams Act Amendments makes no additional restrictions on the States with regard to tender offers. Corporate law is also a tradtional subject for state control. Tender offers relate to both corporate and securities law and on both counts are properly regulated by the states.

The Corporate Takeover Law is designed to protect the shareholders, wherever they reside as owners of an Idaho Corporation, so that the statute does not discriminate against out-of-state residents.

In form, an order prohibiting a tender offer may be said to have an extraterritorial effect on the ability of shareholders in other states to tender their shares to the offeror, but a tender offer is actually a unitary transaction. It is a public announcement of a willingness to buy shares. The acceptance of shares is also a unified purchase. Both federal and state statutes regulate the transaction as a single one. Since the corporation whose structure is at issue is principally located in Idaho, its local interest in this transaction is substantial and the extraterritorial affects ancillary only. They are not so excessive as to unconstitutionally burden interstate commerce.

This statute vindicating local interests in a nondiscriminatory way is entitled to a presumption of validity, rather than the suspicion with which it was greeted by the Courts below which overreached to establish jurisdiction to invalidate it.

POINT I

The Texas District Court never had personal jurisdiction over the Idaho defendants.

Appellants Kidwell and McEldowney were unconstitutionally subjected to a trial and adverse judgment by a court which had not obtained personal jurisdiction over them. This serious judicial abuse was compounded by the fact that it was also an offense to the State of Idaho, whose statute McEldowney was enforcing, because that statute was put in jeopardy and ultimately declared void by a court sitting a thousand miles from Idaho's borders—the first time that has happened in the history of this country.

McEldowney and Kidwell, Finance Director and Attorney General of Idaho, were sued in Texas as if they were private individuals pursuing private concerns, taking advantage of the benefits of a Texas forum and violating the rights of persons protected by federal securities legislation.

A. This Court's Decision In *Ex Parte Young* Does Not Permit State Officials To Be Sued Outside That State.

The Courts below contended that jurisdiction in Texas was compelled by this Court's 1908 decision in *Ex parte Young,* 209 U.S. 123 (1908). But the rule of *Ex parte Young* was not at issue between the parties. It was conceded that there was subject matter jurisdiction in an appropriate Federal District Court to review the validity of Idaho's Corporate Takeover Law under the Supremacy and Interstate Commerce Clauses of the United States Constitution. It was conceded that at least defendant McEldowney was a proper party defendant. He did not assert sovereign immunity against federal judicial scrutiny of his actions. Therefore, the holding of *Ex parte Young* was not disputed by the defendants.

The Courts below, however, said that the theory of *Ex parte Young* converted state officials enforcing state statutes alleged to be invalid into private citizens engaging in private, rather than government, business. That is not what this Court had held.

The importance of *Ex parte Young* is that it set the limit of immunity from suit which could be claimed on behalf of states as sovereigns, because in our federal system state sovereignty is not absolute. See e.g. Justice Brennan's separate opinion in *Perez* v. *Ledesma,* 401 U.S. 82, 106 (1972). Thus, if a state statute or administrative action is in conflict with the United States Constitution it is invalid and in *Ex Parte Young* this Court held that an allegation of invalidity is sufficient to subject that statute or action to federal judicial scrutiny. If the challenged statute or action is invalid, it cannot be the act of the sovereign and the State is not a proper party, being immune from suit, in any event. Thus, the proper party defendant is the individual acting under it.

This Court has never stated that it must pretend that that proper party defendant is acting for his own benefit because he does not have immunity from suit. Quite the contrary, such suits against state officials usually name him with his official title and permit automatic substitution of his successors in office, as was the case here. The merits of most actions made possible by the doctrine announced in *Ex parte Young* could not be determined if the federal courts had to ignore the governmental role of the defendants. Yet the Fifth Circuit said (577 F. 2d at 1265):

> ". . . We read *Young* to say that a state official enforcing an unconstitutional statute is an individual defendant and nothing more. Under the reasoning of *Ex Parte Young,* the state has no interest in the lawsuit, for it is incapable of authorizing an unconstitutional act. . . ."

If that fiction had to be adopted as broadly as the Fifth Circuit suggests, there would be no "state action" in most Fourteenth Amendment cases and subject matter jurisdiction would be lacking. Yet, this Court has referred to *Ex parte Young* as significant in sanctioning the use of the Fourteenth Amendment "as a sword as well as a shield against unconstitutional conduct of state officers." *Juidice* v. *Vail*, 430 U.S. 327, 335 (1977).

If the District Court must pretend that McEldowney and Kidwell are private individuals and that "Idaho's 'business' is to regulate" (577 F. 2d at 1268), then the result cannot be to declare a statute unconstitutional. Must it pretend that the statute is a Corporate charter?

Even the Fifth Circuit did not stick to its metaphor. Throughout the decision it referred to the allegedly unconstitutional actions as "Idaho's." *Ex parte Young* should not be expanded to require courts to ignore reality. It deals only with the specialized sensitive area of sovereign immunity. It is not intellectually dishonest to treat state officials as individuals for naming them as defendants amenable to suit, but to recognize their public role for all other purposes. See *Edelman* v. *Jordan*, 415 U.S. 651, 675-6, n. 18 (1974).

Until this case, since 1909, Courts have consistently managed to do this. Judge Wisdom himself explained it well (*Louisiana Board of Education* v. *Baker*, 339 F. 2d 911, 914 [5th Cir. 1964]):

> "We acknowledge that there is a difference between an individual who may be stripped completely of his representative garb and a state agency inseparable from the state. We realize that an injunction, to the extent that it requires affirmative action by a state official, necessarily interferes with the administration of the state. But all of the corners of some useful fiction simply cannot be rubbed smooth. State immunity from suit under the Eleventh Amendment is an untidy

> area of the law. The time may even have come when it would be well to adjust to the realities, face up to the fact that in these actions against a state agency or public official, the party at interest is the State and hold that the Eleventh Amendment does not contemplate a suit based on state action contrary to the U.S. Constitution. Until that time comes, if it should ever come, the anomaly that enforcement of the Minnesota statute is state action for purposes of the Fourteenth Amendment but merely the individual wrong of Edward T. Young for purposes of the Eleventh Amendment . . . seems indispensable to the establishment of constitutional government and the rule of law."

Also see *Arthur* v. *Nyquist*, 573 F. 2d 134, 138 (2d Cir. 1978); *Board of Trustees of Arkansas A & M College* v. *Davis*, 386 F. 2d 730, 732-3 (8th Cir. 1968), cert. den. 393 U.S. 962 (1968); Louis J. Jaffe, "Suits against Governments and Officers: Sovereign Immunity"; 77 Harv. L. Rev. 1, 18-19 (1963).

In this case, Judge Wisdom went in the opposite direction. Instead of abandoning the fiction for reality which he had earlier recommended, he took the fiction several steps further, mocking reality and creating unnecessary friction among the states and between states and the Federal Securities Exchange Commission. While he recognized that a corporation only acts through its directors (577 F.2d at 1267-1268) it insisted that Idaho officials could be found to have acted outside its borders.

This Court's disapproval of legal fictions is expressed in the recent landmark decision on personal jurisdiction, *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), in which it rejected the fiction that the stockholder derivative suit was against the corporate director's property, rather than his person. Compare *Dred Scott* v. *Sandford*, 19 How. 393, 425 (1856), where the Court indulged in a fiction that a person was property.

In cases in which jurisdiction is obtained under the doctrine of *Ex parte Young,* Courts quite ordinarily recognize that the relief is against the State. This is even true if limited amounts of money from the state treasury are to be paid (*Milliken* v. *Bradley,* 433 U.S. 267 [1977]; *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 [1976]), or if title to state land is at issue (*Narragansett Tribe of Indians* v. *Murphy,* 426 F. Supp. 132 [D.R.I. 1976]), or if the organization of its Legislature is affected (*Baker* v. *Carr,* 369 U.S. 186 [1962]). In *Aldens Inc.* v. *Packel,* 524 F2d 258 (3d Cir. (1975), the Attorney General was sued under the doctrine of *Ex parte Young,* but the counterclaim he interposed was found to be made on behalf of the State.

Unlike the defendants in *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151 (1978), cited by the Circuit Court, the defendants in this case did not seek either the overruling or restriction of *Ex parte Young.* They only opposed the expansion of its legal fiction in such a way as to interfere with the Court's ability to deal with facts before it. Idaho conceded that the Supremacy and Interstate commerce clause claims could be litigated in Federal Court. The doctrine of *Ex parte Young* was not used in *Ray* to extend the arm of another state over the Governor or any other official of the State of Washington, nor did this Court find that any of the Washington State officials could be sued as individual violators of the Ports and Waterways Safety Act of 1972 (33 U.S.C.S. §§ 1221-1227; 46 U.S.C.S. § 391a), although it was ultimately held that certain Washington State statutes were preempted and although it had been alleged that those statutes unconstitutionally burdened interstate and foreign commerce.

At no place in any of the opinions in *Ray* v. *Atlantic Richfield, supra,* did any member of this Court suggest that Washington officials were individuals engaged in "business" although it found that they were not immune from suit.

B. Courts Sitting In Texas Have No Jurisdiction Over Idaho Officials Engaged In Governmental Activity In Idaho, Even If That Activity Is Alleged To Have Unconstitutionally Affected A Corporation With Executive Offices In Texas.

If the decision of the Fifth Circuit is sustained, an allegation that laws or administrative action in one state unconstitutionally affects residents or corporations with a presence in another will be sufficient to require the first state to enter the second to defend itself. The Texas "long-arm" statute (Texas Revised Civil Statutes, Article 2031[b]) establishes jurisdiction in the Texas state courts and indirectly in the United States Courts located in Texas. Thus, according to the Fifth Circuit theory, state courts in Texas also had personal jurisdiction over Kidwell and McEldowney. But, even stretched to its jurisdictional limit, the long-arm of Texas does not reach Idaho.

The Fifth Circuit held that *Ex parte Young,* 209 U.S. 123 (1908), compelled the result. It said that state officials, if they were stripped of their sovereign immunity, must be doing business. That "business" was regulation. (Compare *Brown* v. *Kentucky,* 513 F. 2d 333, 336 [6th Cir. 1975], in which regulation was recognized as a governmental function).

If regulation is business, then federal officials alleged to be acting illegally also are just individuals "doing business." Federal officials are subject to suit for illegal actions by analogy to *Ex parte Young. Philadelphia Co.* v. *Stimson,* 223 U.S. 605 (1912). The long-arm of Texas could compel them to defend in its State Courts, as well.

1. Service On Out-Of-State Officials Cannot Be Made Under The Federal Rules Of Civil Procedure

Service of Federal Court process under state "long-arm" statutes is authorized by Federal Rules of Civil Procedure,

Rule 4(d)(7) and 4(e). However, by their terms, Rules 4(d)(7) and 4(e) do not include service on a governmental organization of the State under Rule 4(d)(6).

Thus, even the Federal Rules recognize that State officials who are not immune from suit still are part of state government. Service on a governmental organization of a state is specially provided by Rule 4(d)(6). This only can be used where sovereign immunity does not apply, which often is when the suit is authorized by the doctrine of *Ex parte Young*.

The territorial limits of process established by Rule 4(f), Federal Rules of Civil Procedure, were far exceeded by the service in this case. The defendants were located neither in the State of Texas nor 100 miles from the Court. In *Clark County, Nevada* v. *City of Los Angeles, California,* 92 F. Supp. 28 (D. Nev. 1950), service on a municipal corporation under Nevada's Long-Arm Statute was found to be invalid on the ground that the only way to secure jurisdiction over a governmental entity referred to in Rule 4(d)(6) was pursuant to its provisions. Also see Moore's Federal Practice, 2d Edition, Vol. 2 ¶ 3.30.

The Texas Long-Arm Statute cannot be used to serve an agency of state government by serving the Secretary of State of another state. The Attorney General, and the Director of the Idaho Department of Finance, are such agencies and the suit is brought against them solely in their official capacity. They are not entities described in Rule 4(d)(3) of the Federal Rules of Civil Procedure nor individuals described in Rule 4(d)(1) of the Federal Rules of Civil Procedure. In *Wallach* v. *Cannon,* 357 F. 2d 557 (8th Cir. 1966), the Court held that service on the Oklahoma Tax Commission had to be made pursuant to 4(d)(6) and 4(f); and therefore it could not be sued in Missouri.

2. It Is Unreasonable To Interpret Texas' Long-Arm Statute As Exercising Jurisdiction Over Officials In Another State

There was no intention on the part of the Texas legislature to assert jurisdiction over officials of another state. In requiring a person "engaging in business in th[e] state" to designate an agent for service of process, it did not manifest its intent to require the Attorney General or Finance Director of Idaho to be amenable to process, even if their actions had an effect in Texas and even if the action was unconstitutional.

Considering the novelty of that interpretation the absence of any language in the statute which indicates such a result and the absence from the legislative history of any such intention, the Fifth Circuit's interpretation is unjustified. Texas had a motive not to include service on state officials who allegedly are administering an act which affects residents of Texas. Texas laws and its officials can be snared in the same net. It can be put to the expense and face the harassment of defending its actions in a distant state specially chosen from the entire nation by the plaintiff bringing the suit.

Interpreted as the Court of Appeals does, the Texas long arm statute would be unconstitutional as violating the Due Process of Law Clause, the Full Faith and Credit Clause and the Eleventh Amendment. Ironically it could be attacked in Idaho under the decision of the Court of Appeals, since it has an effect which would be felt only in Idaho where the defendants do their business.

The Circuit Court's interpretation reverses the flow of traffic which long-arm statutes are supposed to direct. Such laws vindicate an interest in the forum state. So a plaintiff who is a resident in Texas can sue someone with whom he has business dealings affecting his local business, although that person is not physically present in Texas. While the difficult cases are far more complicated, Texas

has very little interest in providing a forum for a large multistate corporation like GWU with a presence, assets, enterprises and the means of defending itself in virtually any state in the nation. Long-arm statutes regularly make corporations like GWU defend away from their executive offices, directors and majority stockholders. It is not for the benefit of this kind of plaintiff that the law should be so manipulated.

The Circuit Court's interpretation of the permissible limits of a state long-arm statute threatens Texas's interest as a forum. If that decision is affirmed, litigation concerning the takeover of a Texas corporation could be heard in the state where the offeror resides, rather than Texas. Yet, it has a distinct interest in jurisdiction in such a case and very little if any, in this one.

Here, it was the defendants who were permanently situated and the multistate plaintiff came to them to do "business." Long-arm statutes do not permit such plaintiffs to go home to bring suit about that business unless the defendants have far more contacts with the forum. GWU's business in Idaho was to take over a corporation principally located there. It is the ownership and control of Sunshine which was at issue here. GWU has always conceded that Sunshine was principally located in Idaho. It forcefully argued that contention to the Attorneys General of New York and Maryland. While the decision has an impact on GWU, it is in its Idaho operations that it is most directly felt. It has an impact because it was GWU that moved interstate, not the Idaho regulators.

The Court's analysis of this business venture was incorrect (577 F. 2d 1268):

> ". . . Idaho's out-of-state regulation had the *direct* effect of stopping a substantial commercial venture based in Texas. No other state had a greater connection with that venture than Texas. . . ."

The commercial venture here was not based in Texas. GWU was trying to buy control of a Company whose principal assets were real property and mines permanently embedded deep under the soil of the State of Idaho. Idaho's interest was paramount.

3. The Defendants Were Denied Due Process Of Law

The Court paid lip service to the proper Constitutional standard of fairness of the forum to the rights of the defendant extending from *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1946) through *Hanson* v. *Denckla,* 357 U.S. 235 (1958) to *Shaffer* v. *Heitner,* 433 U.S. 186 (1977) and *Kulko* v. *Superior Court,* 436 U.S. 84 (1978). But its assertion that the defendants could foresee a suit in Texas is unjustified. There is no precedent for obtaining jurisdiction over state officials of another State under a state long-arm statute or the Securities Exchange Act. GWU conceded Idaho's jurisdiction. Its object was to gain working control over an Idaho Corporation. Idaho did not depend on the enforcement of its order in Texas. A litigant's right to due process of law guarantees a fair forum. It cannot be required to have foreseen resort to Texas law. But even if Idaho as a State conceivably might have foreseen that possibility there is no chance that, as individuals "doing business", Kidwell or McEldowney would have.

In *Idaho Potato Commission* v. *Washington Potato Commission,* 401 F. Supp. 171 (D. Idaho 1975), the defendant Commission was acting in a proprietary capacity to promote Washington's produce. It was not even supported by state funds, but its individual members still could not be sued in Idaho for trademark infringement. The Court held (*Id.* at 182):

> ". . . It is doubtful that the individual members of the Commission could reasonably have anticipated that their activity in Washington could subject them to personal liability in a distant state such as Idaho. . . ."

In *Miller* v. *American Telephone and Telegraph Co.*, 394 F. Supp. 58 (E.D. Pa. 1975), *aff'd.* 530 F. 2d 964 (3d Cir. 1976) a stockholder derivative suit as against out-of-state directors of AT & T could not be brought in Pennsylvania. They had not purposely availed themselves of the privilege of the forum (*Id.* at 64):

> "A contrary ruling here would mean that any individual accepting a directorship of a national corporation would effectively be conceding *in personam* jurisdiction over himself or herself in any state with a statute similar to that of Pennsylvania. This Court believes that neither due process nor sound policy will permit such a result. Where the only occurrence in Pennsylvania is the indirect harm resulting to resident stockholders from the individual defendants' actions, the exercise of personal jurisdiction over these individuals would be both unreasonable and unconstitutional. . . ."

Even if the defendants were engaged in a commercial enterprise, the circumstances would preclude a Texas forum. Contact was initiated by the plaintiff who has a presence in the defendant's state, did enter it and contemplated expanding its operations there. The defendants never entered or contemplated entering the forum state.

Defendants have fewer contacts with the forum than the defendants in *Ursini* v. *The Menninger Foundation*, 384 F. Supp. 158 (E.D. Cal. 1974), in which the Court held that a series of letters between plaintiff in California and the defendant in Kansas were insufficient to establish jurisdiction over the defendant in California (384 F. Supp. 158, 161-2):

> ". . . plaintiff was the party initiating the contact by mail and defendant merely answered the correspondence and made further inquiry. The interchange of letters and information created no binding contract or agreement enforceable by either party, and at best may be described as preliminary negotiation. The actual business arrangements and contracts were executed in Kansas. It cannot be said that defendant purposefully availed itself of the benefits and protection of California law so as to subject itself to California's jurisdiction. *Hanson* v. *Denckla, supra.*
>
> "And even if it could be said that defendant did an act or consummated a transaction within California and that the cause of action arose as a result of the defendant's hereinabove described activities in California, this Court cannot assume jurisdiction in consonance with the due process tenets of fair play and substantial justice. To hold defendant in this case subject to *in personam* jurisdiction in California would subject every person, corporation, university, or association to California's adjudicatory power on the basis of a mere reply to correspondence which had initiated from Calfornia."

Last term this Court held that California did not have jurisdiction over the husband in a custody dispute although he had consented to his child's presence in that State after a marital separation in New York. *Kulko* v. *Superior Court*, 436 U.S. 84 (1978). This Court found that he derived no benefit from activities in the State (*Id.* at 96-7) and had insufficient contacts to justify fairly California's assertion of personal jurisdiction.

The Circuit Court's protest that its decision would provide no damaging precedent for harassment of State officials is not justified. There is nothing unique about a state regulation which affects a multistate corporation doing business in that state, although its executive officers are elsewhere. The decision below stands for the proposition that any allegedly unconstitutional state regulation of a multistate Corporation doing or seeking to do business in that State, exposes its officials to suit wherever that Corporation is located.

If Shakey Pizza, a GWU subsidiary, had filed papers to establish franchises in Idaho and Idaho teletyped a response requiring greater disclosure, under the analysis of the Court below, GWU could attack that requirement in Judge Hill's courtroom just as it did the Idaho Takeover statute. In fact, another Texas Corporation has done just that. An action is now pending in the District Court for the Northern District of Texas against Minnesota officials, enforcing their franchise law against a Texas Corporation seeking to do business in Minnesota. *Omni Industries, Inc.* v. *John R. Larson, et al.* (N.D. Tex. #3-78-1093-D). Jurisdiction and venue are asserted under the authority of the decision below.

The jurisdictional limits of the Texas long-arm statute, even when given the maximum permissible extent, cannot secure jurisdiction over Idaho or its officials acting in their governmental capacity.

C. The Securities Exchange Act Does Not Provide Personal Jurisdiction In Actions Not Authorized By Its Terms.

The Circuit Court found personal jurisdiction over Kidwell and McEldowney under § 27 of the Securities Exchange Act (15 U.S.C. § 78aa), on the theory that this action was a suit to enforce a duty under that act. That "duty" it said, was established by § 28 of the Act, which is a saving clause for state securities statutes unless they "conflict" with the federal act. The theory is that this section establishes a duty not to "conflict" with the act.

Idaho readily concedes that its statutes may not conflict with the federal act and that an allegation of conflict is actionable in a federal court. However, such a suit is brought as a suit under 28 U.S.C. § 1331, alleging a violation of the Supremacy Clause. The Securities Exchange Act, including § 28, then is authority for and evidence of the alleged conflict, but the suit is not authorized by the Securities Act. A Congressional statute is not sufficient

to invalidate a state statute. The Supremacy Clause of the Constitution of the United States is a necessary ingredient. Congress could have authorized special jurisdiction and venue provisions for such a suit, but without clear legislative intent, it should not be presumed to have done so. See *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 284-285 (1973).

For instance, in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) decided last term, this Court found that certain Washington state statutes conflicted with the Ports and Waterways Safety Act of 1972 (33 U.S.C.S. §§ 1221-1227; 46 U.S.C.S. § 391a); but the suit was brought under the supremacy clause. The Congressional statute in that case had specific prohibitions against state regulations (33 U.S.C.S. § 1222[b]) and dealt with coastline shipping, an area of special federal concern. Nonetheless, that act of Congress was not the jurisdictional basis for the suit, although it was authority for the decision and evidence of "conflict" or lack of it.

It takes a tortuous reading of the 1934 Securities Act to find that its general authorization to institute suits against persons who deal in or issue securities could be used by such entities to sue persons who regulate those securities. Different jurisdictional considerations ought to have entered the picture before Congress is imputed to have permitted such an action. But the Court below points to no instance where a regulator was sued pursuant to the authority of § 27. Federal regulatory officials also could be alleged to have a duty established under this section. Hence, if the Circuit Court's theory is correct, they could be subject to suit wherever they telephoned, telegraphed or mailed any response to an entity subject to the Act. Yet, in its long history, we are given no instance where § 27 has been so utilized. That being so, defendant public employees could not reasonably foresee their being subject to jurisdiction in another State. The limits which due process mandates on personal jurisdiction apply to actions brought

under the Securities Exchange Act, as well. E.g., *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326, 1340-1342 (2d Cir. 1972); *Keene Corporation* v. *Weber*, 394 F. Supp. 787 (S.D.N.Y. 1975).

Furthermore, there is insufficient rationale to apply the liberal jurisdiction and venue provisions and nationwide service of process to a multistate corporation as plaintiff, especially to be used to sue individuals residing and acting in only one state—a state where the plaintiff does business. Those conditions not only prevail in this case, but would exist in most cases where an individual state securities regulator is alleged to act in "conflict" (§ 28, of the 1934 Act, 15 U.S.C. § 78bb) with the Securities Exchange Act.

Yet, the purpose for the liberality of § 27 was to grant access to a local court for a plaintiff claiming to be the victim of an interstate securities *fraud*. He could bring suit in the district where the defendant took positive steps toward perpetrating the fraud (e.g., where securities were offered or sold, often in plaintiff's home district), rather than to be required to travel to the district where the corporation's executive offices were located. This remedial venue provision was intended to prevent frauds by facilitating access to the district courts, *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195, 205 (5th Cir 1960), *cert. den.* 365 U.S. 814 (1961):

> "The Act meant to vest jurisdiction in every district where any use of such instrumentalities of the mail or interstate commerce was of material importance to the consummation of the scheme."

Defendant McEldowney used the mail only to inform plaintiff of the Department's action and sent the letter and order to Texas as requested by plaintiff.

Defendants McEldowney or Kidwell are not accused of having committed a "fraud" or a "scheme." The facts alleged and proven at trial will not support such an interpretation. At most, plaintiffs have alleged a "conflict" (1934 Act § 28, 15 U.S.C. § 78bb; *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 [1977], *Florida Lime and Avocado Growers* v. *Paul*, 373 U.S. 132, 146 [1963]). Section 27 does not authorize a suit in which there is a "conflict" with the 1934 Act. It governs a "liability" a "duty" or a "violation."

Furthermore, this Court has held that the Williams Act does not expand the availability of federal jurisdiction to suits brought by the offeror. *Piper* v. *Chris Craft Industries*, 430 U.S. 1 (1977).

The Circuit Court's authorization of a new cause of action under the 1934 Act, is illogical, unfair to these and other potential defendants, abrasive to federal-state relations and unnecessary.

POINT II

Venue lay only in Idaho where the regulatory action occurred and where the defendants and the target company resided.

There was no defensible reason for bringing this suit in Texas. Personal jurisdiction over the defendants was available in Idaho whose District Court was the convenient appropriate forum. No question of the cause of action arising there could have been raised. The plaintiff GWU, had a presence there and had conceded Idaho's jurisdiction over the takeover. It had appeared and filed papers in Idaho which act was crucial to the claims they raised below.

In fact, an action under the federal Williams Act, the validity of which GWU champions, was properly heard there. Three days after this doubtful proceeding was begun, GWU was defending its proposed tender offer in the United States District Court in Idaho with its first-string

takeover lawyers. Yet, it persisted in continuing this action in an inappropriate forum.

GWU, a nationwide company, could have sued as easily in Idaho as at home. The majority stockholders, the two Hunt brothers, did not testify nor was their presence at the proceedings necessary. Most of GWU's witnesses were not from Texas. The only defense witness from Texas was the executive Vice-President of GWU. Indeed, the testimony of several witnesses (Strom, Heard, Parish, Dugan) who testified as to jurisdictional issues would not have been necessary if the proper forum were chosen. Certainly, much preliminary litigation could have been avoided.

It is no justification for venue in Texas that originally there were defendants from three states. Compare 577 F. 2d at 1273. None of the original defendants was from Texas. It is our position that a suit against a state official acting in his governmental capacity must be brought in the state of which he is an official. GWU's claims against each state's statute is a separate cause of action. GWU had taken the position that Idaho's interest in the control of Sunshine was superior to that of New York and Maryland, and Idaho had asserted jurisdiction. Therefore, had it sued in Idaho, GWU would have had jurisdiction over at least one set of defendants. Since those defendants were the only ones who had acted to delay the proposed tender offer, the District Court in Idaho could have protected GWU from any immediate effect of the allegedly unconstitutional statutes.

Of course, in this case, the complaints against New York and Maryland were speculative and ultimately unnecessary.

In *Turner* v. *Baxley*, 354 F. Supp. 963 (D. Vt. 1972), the Court held that Attorneys General of several States would have to be sued separately and that the exercise of

the Vermont long-arm statute would deprive them of their Constitutional rights. Yet, *Turner* made a far stronger case for Vermont's jurisdiction than GWU did to support jurisdiction in Texas. Two of the defendants (the Attorney General and an Assistant) resided in Vermont and personal jurisdiction over them was found. The other State Officials were alleged to have acted personally and improperly. Each was alleged to have engaged in a conspiracy to deprive Turner of his constitutional rights. Furthermore, the allegation of conspiracy was said to justify a unified cause of action. But the Court held that the out-of-state Attorneys General had insufficient contacts with Vermont to satisfy due process (*Id.* at 975-978), and it was reasonable for plaintiffs, interstate corporations and their principal stockholder to bring separate actions in the various states (*Id.* at 978):

> "Should the plaintiffs find that their only recourse is to bring individual actions against each conspirator in his home state, this would present no overriding hardship to them under the circumstances presented here. The plaintiffs do business in each of these states; actions are in progress or have been concluded against them in each state; plaintiffs clearly have the legal administrative and financial resources available in each forum to bring individual actions at no severe hardship to themselves. The lack of such resources was an important consideration in the contrary result reached by the Court in [*McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1958); *Travelers Health Association* v. *Virginia*, 339 U.S. 643 (1950)]."

GWU contended that delay allegedly occasioned by Idaho's Corporate Takeover Law would prejudice its proposed tender offer. Yet, GWU chose an inappropriate forum and persisted in that choice, despite the expense and delay it caused and despite the availability of an appropriate convenient forum.

The only explanation of plaintiff's choice of a forum was the hope of an unfair advantage in the District Court in Texas. Whether GWU had expected the Texas Court to be friendly or whether it had hoped to harass the defendants with expense and difficulty, plaintiff's choice of venue should have been rejected.

A. The Venue Of This Action Cannot Be Determined By Reference To Section 27 Of The Securities Exchange Act, Since It Is Not Brought Under That Act.

Establishing venue under the Securities Exchange Act is no more appropriate than resting personal jurisdiction on it. See pp. 39-42, *supra*.

The Circuit found venue because it said an act constituting a part of the "violation" of the 1934 Act occurred there. The Court said that one act which occurred in Texas was the "effect" of the regulatory activities in Idaho and cited *Travis* v. *Anthes Imperial Limited*, 473 F. 2d 515 (8th Cir. 1973) for that proposition. But *Travis* bases venue on the fact that repeated communications were received by the plaintiffs in the Eastern District of Missouri. It bolsters that argument by stating that the only place where the effects of the Canadian activity were felt was in the same district. Plaintiffs owned more than 160,000 shares of the defendant Canadian Corporation. It was the communications from the defendants which were alleged to be the fraudulent inducement to retain its stock while a corporate takeover was occurring in Canada. Furthermore, the ultimate coerced sale of plaintiffs' stock actually occurred in the forum state. Judge Godbold, distinguishing *Travis* in dissent, notes that the statement that venue lies where the effect of the conduct occurred was makeweight (577 F. 2d at 1293-1294).

In *Higelman* v. *National Insurance Co. of America*, 547 F. 2d 298, 301-302 (5th Cir. 1977), Judge Godbold, speaking for the Court, stated that jurisdiction and venue over

a violation of the Securities Exchange Act were placed where a material act or transaction constituting the violation occurred. He held that the annual premium notice sent to Alabama and the annual premium sent from Alabama *might* be such a material act.

In *Mayer* v. *Development Corporation of America*, 396 F. Supp. 917, 918-930 (D. Del. 1975) the gravamen of the complaint was admittedly false and misleading proxy solicitation material. The Court held that sending even one such mailing to Delaware was sufficient to place venue there because it was the communication itself which was false and misleading.

Each of these cases cited by the Fifth Circuit is an example of a cause of action properly brought under the Securities Exchange Act § 27. In each, the plaintiffs are holders of securities and the defendant is the corporate issuer of securities. Here, the issuer of securities is the plaintiff and State Officials, the defendants.

In *Travis* and in *Higelman*, unlike this case, the acts in the forum were repeated. In *Mayer*, the proxy statement was sent to many individuals at the same time it was sent to the plaintiff. In *Travis* and in *Mayer*, the receipt of communications sent to the forum were themselves alleged violations of the act. False and misleading communications were the frauds that they allegedly practiced on the plaintiffs which would entitle them to relief. Here, it was not the receipt of the letter of comment and order in Texas that was the alleged "violation." It was its official promulgation in Idaho.

B. Venue Over This Cause Of Action Properly Governed By 28 U.S.C. § 1391(b) Lay Only In Idaho.

Venue over this action is governed by 28 U.S.C. § 1391(b) which provides for venue where all the defendants reside or where the claim arose. The Circuit Court noted a disagreement among the commentators as to whether the claim

can arise in only one district (15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction § 3806 at 28-29 [1976]) or anywhere that compulsory process on a non-resident would be proper (1 MOORE'S FEDERAL PRACTICE ¶ 0.142 [5-2] at 1430-2).

But, where defendants are State officials acting in their governmental capacity, there is no authority to place venue outside the borders of their State. See *D'Amico* v. *Treat*, 379 F.Supp. 1004 (N.D. Ill., 1974), *aff'd* 510 F.2d 976 (7th Cir. 1975); *Jones* v. *Bates*, 58 FRD 453 (N.D. Ga. 1972), aff'd 480 F.2d 805 (5th Cir. 1973); also see *NRDC* v. *TVA*, 459 F.2d 255 (2d Cir. 1972). Constitutional limitations on their actions confine them to those borders. The Courts below consistently confused the substantive allegation of extraterritoriality with procedural questions of the locus of the action. If they are correct in finding that Idaho's action had unconstitutional extraterritorial effect (but, see *Point IV, infra*), the substantive result would be to restrain Idaho within its own borders as the Constitution requires. Nonetheless, the void extraterritorial order would have issued from the only place it could have—within the State of Idaho and only there could the claim arise. At the very least, federal recognition of comity to the States requires this interpretation.

There might have been a reason for trying to place venue outside Idaho if an out-of-state stockholder was seeking to tender his shares and attacked the extraterritorial impact of the Idaho decree. But, where the plaintiff is a multistate corporation and the cause of action involves its attempt to take over control of an Idaho corporation, the placing of venue outside Idaho is unjustified. Arkansas venue was upheld where an Illinois corporation thrust itself into Arkansas affairs. *Gardner* v. *Page*, 484 F.2d 27 (8th Cir. 1972).

Yet, the Circuit Court held that the claim arose only in Texas, betraying a lack of appreciation of the nature of

GWU, its tender offer and the record before it. GWU is located all over the United States, not only in Texas. At the time of trial it still had corporate headquarters in Colorado and substantial assets in Colorado and Nebraska. It was organized in Delaware. Its stock was traded on the New York Stock Exchange. SEC form 10-K, GWU (1975).

The record makes clear that the proposed tender offer was intitiated in New York, not Dallas, as the Circuit Court stated. Indeed, the filings under the Federal Act and the Idaho Corporate Takeover Act were prepared in New York and transmitted to the SEC and defendant McEldowney from New York. The stocks were to be tendered to a bank located in Chicago, Illinois. Proposed Tender Offer (3/21/77). Lastly, it was GWU's Idaho operation which was affected by the Idaho statute.

Even this seemingly innocuous portion of the Circuit Court's opinion provides dangerous procedural precedent. It holds, for the first time, that venue over a claim against state officials acting in their governmental capacity can lie in another state. It also holds that claims affecting a multistate corporation arise only where the corporation's executive offices are located, even if the claims involve its business in another forum.

Compare *ITT Thorp Corp.* v. *Fireman's Insurance Co. of Newark, New Jersey*, 428 F. Supp. 62 (E.D. Wis. 1977), in which venue was placed in Iowa where defendant's employee committed his allegedly dishonest action and *Trans-America Corp.* v. *Transfer Planning*, 419 F. Supp. 1261 (S.D.N.Y. 1976), in which defendant's communication to and minimal contacts with New York did not support venue there.

POINT III

There is no conflict between the Idaho Corporate Takeover Law and the federal Williams Act, both of which seek to protect the stockholders in the target company.

The cash tender offer or corporate takeover bid is a relatively new method for obtaining control over a corporation. While it began to be used in the 1960's (BARTELL 205-206), the frequency of such offers has escalated since 1973 (CHATLOS 285).

Thus in 1970, when Congress passed the Williams Act there was not sufficient experience to enable it to enact the carefully constructed regulatory mechanism which the Courts below thought it to be. Manuel F. Cohen, then Chairman of the SEC, said ("Senate Subcommittee Hearings") "This is a developing area, one that is developing rather rapidly, and our understanding and experience is being enhanced every day and with every new takeover bid." (Senate Hearings,* 15). The SEC wished to be given flexible enforcement "tools to deal effectively with the various techniques that have been developed, and are continuing to be devised, to seek or to prevent takeover bids . . ." (Senate Hearings, 33).

Unlike the drafters of the Securities Act of 1933 and the Securities Exchange Act of 1934 who could draw upon the experience of state regulation of securities under the well-established "blue-sky" laws of the time, the 90th Congress had no such well-spring knowledge concerning cash tender offers to draw upon.

That experience is being gained right now in what Justice Brandeis would call "laboratories" (see *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) [dissent])—

* Hearings on S.510 Before the Subcommittee on Banking and Commerce, 90th Cong., 1st Sess. 15 [1967].

the offices of securities administrators in the 36 states which regulate takeovers, as well as in the SEC and Congress. Congress has expressed no intent to exclusively occupy the field of securities regulation, in general or of corporate takeovers, in particular. Both are governed by the permissive section 28(a) of the Securities Exchange Act of 1934. But the Court of Appeals found that the Idaho statute conflicted with the federal Williams Act and thus was invalid under the Supremacy Clause.

A. The Idaho Corporate Takeover Law Complements the Williams Act In Protecting Shareholders Of The Target Company.

GWU's proposed tender offer was, by its own terms and as governed by the Williams Act and the Idaho Corporate Takeover Law, a unitary transaction to obtain working control of Sunshine, heretofore a widely held corporation. Its offer, at a very small premium, was to purchase up to two million shares of Sunshine common stock. It already owned 334,070 shares, the largest block of the 5,800,000 shares outstanding.

The offer had been prepared uniltaterally by GWU in secret and without negotiation, sprung on the management of Sunshine on March 18 and 3 days later announced to the public on March 21. Under the Williams Act all holders of Sunshine's common stock would have had to evaluate the information available and make their investment decisions in 10 days, by March 31. This would be true even if the disclosure of pertinent information were insufficient to satisfy the requirements of the Williams Act, since there would be no administrative review before the offer was made.

It is necessary for a shareholder to be given all relevant information about the offer and a sufficient opportunity to evaluate that material.

Inevitably caught by surprise, shareholders of a target company must decide whether to (1) tender their shares, (2) sell their shares on a securities exchange, or (3) hold their shares. If the shareholders tender their shares without adequate notice they may lose the opportunity to sell later to a subsequent bidder at a higher offering price or to hold them to realize greater profit. If they sell their shares on a securities exchange at a premium usually offered by arbitraguers, they would miss the opportunity to sell at the higher tender offer price, to sell at an even higher price to a competing bidder or to hold them. If they hold their shares they may miss all of the short run opportunities for profit. See Senate Hearings 2.

These decisions affect the economic well-being of the shareholder and may involve a substantial portion of his assets. If his decision to make the initial investment involved careful analysis of the market and of the company in which he entrusted his assets, he is certainly, during a "Saturday Night Special", robbed of the opportunity for clear and careful decision. A shareholder who has determined to hold his shares for a long term is pressured to sell against his previously determined interests because he now lacks information as to the future policies of the company.

Many stockholders do not regularly trade their shares; but retain their interest in particular companies (CHATLOS, T 361-362, 5/24/77). It would have been reasonable for the Idaho Legislature to have found that the State in which a company has its principal place of business and substantial assets would have a concentration of such investors. Founders, their friends, family and heirs are apt to reside there. Officers and former officers and their family and friends are likely to be stockholders. Employees, former employees, pension and other employee benefit plans are also likely to have bought stock in such a company. Customers, suppliers, their employees and agents, also are likely to be stockholders within that state. Citizens of the

local community would be more likely to buy and hold the target company's stock. Such stockholders have a particular dilemma. They might wish to hold their stock, but it probably would now be in the control of new parties with different policies. Virtually all target companies lose their independence when a tender offer is proposed (CHATLOS, T 328-30, 5/24/77). If a shareholder cares about the policies of the company he owns because of personal connection or as a public spirited citizen, he is forced to decide between economic protection and these interests without the information to decide either issue.

1. The Williams Act

Congress, in the Williams Act, sought to alleviate the stockholder's confusion and provide him with certain protections. First it required disclosure of information material to a security holder's decision, including details about the offeror and about his plans in a schedule 14D-1.* 2 Fed. Sec. L. Rep. (CCH) ¶ 24,284C at 17, 715-17, 718. All other persons making recommendations or solicitations must also file 14D disclosure statements. Material information filed in the offeror's 14D statement must be transmitted to the shareholder along with the offer (15 U.S.C. § 78n[d][1]).

The Williams Act also guarantees the shareholder some time to make up his mind. The offer must stay open for at least 10 days* and the shareholder may withdraw his tendered shares in the first seven or after 60 days if the offeror has not yet purchased them. 15 U.S.C. 78n(d)(5). If more securities are received than are accepted, each individual tendering receives a *pro rata* share back. 15 U.S.C. § 78n(d)(5). Because of this provision, even a

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* At the time of trial it was designated a 13D statement.

* The SEC has just proposed extending that period to 30 days. SEC Release Nos. 33-6022; 34-15548, IC-10575; file No. S-7770 (17 CFR Part 240) TENDER OFFERS Proposed Rules Schedule (2/5/79).

tendering shareholder has to evaluate the offeror and his plans because he may continue to own stock in the company it controls. The Williams Act further promotes equality among the shareholders by mandating any increase in the offer be paid to all shareholders whose tendered shares were purchased. 15 U.S.C. § 78(n)(d)(7).

A broad antifraud provision prevents false and misleading statements and fraudulent manipulative practices by any person regarding an offer. 15 U.S.C. § 78n(e).

2. The Idaho Statute

The Idaho statute also was designed to protect the target company's shareholders. Like the Williams Act, the Idaho statute requires the filing of material information affecting the offer. (Idaho Code § 30-1502, 1503[c]-[d]),—that information must be made public and served on the target company (Id. § 30-1503[i]).

The most significant distinction between the Idaho statute and similar state statutes, on the one hand, and the Williams Act, on the other, is the provision for administrative review before the offer is made if the shareholders' elected representatives acting in their fiduciary capacity have not recommended the offer (Idaho Code § 30-1503 [1], [3]-[4]). Some state statutes, like New York's (NYBCL § 1602), have a waiting period after filing before the offer is made, but Idaho's law imposes no predetermined amount of time. It does, however, affirmatively charge its State Finance Director with a duty to review the filing and the offer cannot be made until he approves it (Idaho Code § 30-1503[4]).

3. The Idaho Security Administrator's Letter Of Comment Was Consistent With The Williams Act Disclosure Requirements.

Since this was the first filing in Idaho, there is insufficient experience to support a finding that review under this statute would unreasonably delay the tender offer. It can

be said that in this instance the securities administrator acted promptly (Baptie, T 380-407, 5/24/77). His letter of comment (Boswell 77-85) sent four days after the filing dealt only with facts material to the shareholders' decision and ones which should have been filed with the Securities and Exchange Commission. 17 CFR 240.13D-101 (superseded by 17 CFR 240.14D-100).

Baptie required GWU to supply missing portions of the schedule 13D filed with SEC to correct misstatements as to the effect of Idaho law to eliminate a misleading phrase that it would be a "risk" to Sunshine's shareholders, if GWU were to be willing to purchase all shares and to clarify the phrase "working control" which was crucial for the shareholders because that was identified as GWU's objective in making the tender offer. In all these respects, the state administrator was vindicating the requirements of the Williams Act as interpreted in the regulations of the SEC. Those requirements could have been easily complied with.

Idaho's statute requires full disclosure of the future plans of the offeror—information without which an informed investment decision cannot be made (Idaho Code § 30-1502 [c]):

> "If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which such person has, upon gaining control, to liquidate the target company, sell its assets, effect its merger or consolidation, or make any other major change in its business, corporate structure, management or personnel."

The SEC also requires that disclosure in even more detail. (240.14d-100). Baptie requested disclosure of the impact of the issuance of Sunshine's authorized stock or of the sale of its subsidiaries. These requests were not in conflict, but in conformity with the Williams Act.

Idaho's statute requires disclosure as to the organiza-

tion operations and finances of the offeror (Idaho Code §§ 30-1502[1], 1503[2c-d]).

The SEC requires financial statements which would ordinarily be on file already, such as those in conformity with form 10 (17 CFR 249.219) for domestic corporations. 17 CFR § 240.14d-100 Item 9.

Baptie requested GWU to provide information as to its stock, debts, principal properties and plans to recapitalize. That information could have been readily supplied as it should have already been on file with the SEC.

Idaho's statute requires rather complete disclosure of the offeror's past relations with the target company or its stockholders. It requires disclosure of the method of financing the offer.

The SEC requires exhaustive disclosure (17 CFR § 240.14d-100, Items 3-4, 6, 7 and 8) of relations between the offeror and target company and its current interest in the securities of the target company. These include, for instance, all "contracts, arrangements, understandings or relationships with respect to the [Target] company's securities" (*Id.* Item 7). It also requires information as to the method of financing the offer (*Id.* Item 4).

Baptie requested disclosure of GWU's relations with Hecla and Silver Dollar, their litigation with Sunshine, and the financial arrangements for the offer. This request was for no more than should have appeared in the SEC filings. His requests were not in conflict with the Williams Act.

The Idaho statute requires that all of the target company's shareholders be treated on "substantially equal terms" (Idaho Code § 30-1503[5]).

The Williams Act requires that all tendering shareholders be paid at the highest price paid any of them (15 U.S.C. § 78[n][d][7]) and that shares be prorated, if the offer is over-subscribed (*Id.* subsection 6).

Baptie raised the question whether GWU's agreement to pay Hecla's and Silver Dollar's unsuccessful proxy fight expenses was an additional payment for their block of shares in Sunshine. GWU failed to respond to that or any other matters in the letter of comment. The same claim, this time under the Williams Act, was raised by Sunshine and ultimately rejected by the District Court in Idaho (52-54).

Baptie's question did not conflict with the Williams Act.

In suggesting that Baptie's letter was unreasonable (577 F. 2d at 1263-1264), the Court below trivialized the disclosure requirements of the Williams Act. Congress determined that the disclosure of material information was necessary to enable the prudent investor to make a reasioned decision when confronted with a tender offer. E.g. 173 Cong. Rec. 854 (1967), cited in *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 26 (1977). The state administrator's function was to make sure that that duty is enforced.

B. State Administrative Review Promotes Compliance With Both State And Federal Requirements.

Theoretically, pre-offer review extends the time between the announcement of the proposed tender offer and its consummation (see decision below 577 F 2d at 1277-1279). As a practical matter, it is not clear that the state administrator's examination actually adds to the delay of most tender offers. Because the SEC ordinarily does not review the material filed under the Williams Act, it is standard operating procedure for an antagonistic target company to sue the offeror for failing to comply.* See *Wheat*, T 270,

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* In contests for corporate control preliminary is preferable to post-control relief, e.g. *Electronic Specialties Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969), cited with approval in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41-42 (1977).

5/24/77, LIPTON & STEINBERGER, *Takeovers and Freezeouts*, p. 304 [1978]). Even if there has been no violation of the Williams Act and full disclosure has been made, the target company always has at least three powerful arguments to obtain delay in the Federal Court. The first is the shortness of time to examine the filings or secure other facts before the tender offer is open or before it is completed. Secondly, the spectre of "irreparable injury" (FRCP Rule 65[b]) is the constant companion of the target company. In 10 days it will cease to exist, unless sustained temporarily by a District Court order. Third, the availability of liberal discovery can be used by the target company as a shield or a sword. It can seek information necessary to evaluate the offer, as, for instance, Baptie did in his letter, or it can seek to harass the offeror and delay the offer.

It is difficult for a District Court to refuse to give the target company some time to explore the validity of the offer and the sufficiency of disclosure. Ten days is an unrealistically short time for important business decisions such as this to be made (WHEAT 259-261; CHATLOS 287-288). The Idaho Court granted a temporary restraining order against this offer for 22 days—from April 1 to April 22, 1977, a fact pointedly left out of the Circuit Court's speculation as to the speed with which the Williams Act would have permitted the takeover. The Fifth Circuit stated that the Idaho Court had denied a preliminary injunction; but it omitted the fact that an extended temporary restraining order had been granted. 577 F. 2d at 1263, including n. 11.

If an independent state administrator had evaluated the disclosure by the offeror, the first and third arguments of the target company for temporary relief might be weaker. Furthermore, if a more reasonable length of time is permitted by the State statute, the target company's Williams Act case will diminish, unless substantial non-compliance can be demonstrated.

The basic difference between the Williams Act and the Idaho Corporate Takeover Law is that under the latter, an independent state administrator reads, evaluates and checks the disclosure statement, assuring its completeness, clarity and accuracy, while the Williams Act leaves it to the target company in show-cause-order-litigation to identify deficiencies in the offering statement. It is the state statute which provides for neutrality in the person of an objective public administrator. It is the SEC which leaves the enforcement of its disclosure provision to the antagonistic parties. Compare decision below 577 F. 2d at 1278-1280.

The Idaho law permits the Finance Director to order a hearing on compliance with its provisions and requires him to do so if demanded by the target company. That requirement is criticized on two grounds—that it gives an unfair advantage to the target company and that it delays the offer.

C. The Idaho Law Offers Little Protection For The Target Company, But It Does Promote A Market For The Benefit Of The Shareholders

The Court below found that Idaho had given the target company too much ability to defeat the offer. William Chatlos (283-284) demonstrated without contradiction that target companies do not survive, whether there are state statutes or not. They cease to exist as independent companies. They are doomed by the offer—or, more likely, by the market conditions which produced it (WHEAT 263-265; CHATLOS 285-287).

The claim that target companies are given an unfair advantage by this or any state takeover law is a red herring used by offerors to defeat the open corporate auction market which the Williams Act and state laws similar to Idaho's promote (WHEAT 262-263; CHATLOS 283-288).

Idaho made no effort to protect "entrenched management." E.g. Senate Hearings at 134, 178-179. The District

Court found that Sunshine had not influenced Baptie's actions in any way. 439 F. Supp. at 424 n. 4. Sunshine's principal corporate officers did not reside in Idaho, but in New York and Colorado. They were unlikely to receive much unfair advantage at the hands of Idaho officials due to their callous denial of responsibility for the fire in the mine and resistance to the miners' demands which resulted in the lengthy strike.

However companies with enlightened management more often are the targets for takeovers since the key usually is a low price-earnings ratio. High earnings are not the earmark of entrenched management. In a recent large takeover of Carrier Corp. by United Technologies Corp., Harry Gray, President of the offeror repeatedly stated that he was attracted to Carrier by its excellent management. *In the Matter of Takeover Bid By United Technologies Corporation for equity securities of Carrier Corporation* (Order and decision of the Attorney General of the State of New York, Bureau of Securities, 11/10/78). It is the target company, as an independent entity that is doomed. Whether the enterprise will continue or be "raided"* depends on the offeror. The shareholder must be able to evaluate the offeror and its plans.

The offeror attacks the target company, but what it really fears is a new and higher bidder. Yet, it is the appearance of the subsequent bidder which signals the market that

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* See this Court's reference to Senator Kuchel's discussion in *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 28 (1977):

> "'Today there are those individuals in our financial community who seek to reduce our proudest businesses into nothing but corporate shells. They seize control of the corporation with unknown sources, sell or trade away the best assets, and later split up the remains among themselves. The tragedy of such collusion is that the corporation can be financially raped without management *or shareholders* having any knowledge of the acquisitions. . . . The corporate raider may thus act under a cloak of secrecy while obtaining the shares needed to put him on the road to a successful capture of the company.' 113 Cong. Rec. 857-858 (1967). (Emphasis supplied.)"

favors the shareholder. See the decision below 577 F. 2d 1276, 1277. Also see WHEAT 263-266; CHATLOS T. 329, 5/24/77; CHATLOS *The SEC* v. *Investors on tender offers*, Harv. Bus. Rev., Sept.-Oct. 1978. The geometric explosion in the number of tender offers since 1973 has coincided with the increase in the number of state statutes regulating them. It does not appear that tender offerors have been deterred by the state laws, although they may encourage more bids. It was not the purpose of Congress to guarantee success for the first offeror—it was the creation of a market that Congress was promoting. CHAIRMAN COHEN, Senate Hearings 184. If undue speed is permitted the offeror and careless compliance with disclosure requirements, countenanced, that potential bidder will be preempted. This Court should not protect the offeror from that market.

There can no longer be any doubt that the 10 days for an offer to be open is an unrealistically short period to protect investors. Congress prevented an offer from being completed in less than 10 days by its requirement that all shares tendered in 10 days must be prorated. 15 U.S.C. § 78n(d)(6). The SEC has the power to increase that minimum at least to 60 days. 15 U.S.C. § 78n(d)(5) and it has now proposed an increase to 30. See note on p. 55, *supra*.

The longer it is before the offer is completed, the more likely that the shareholder will receive fair value for his stock (CHATLOS 285-287; Also see *Chatlos op. cit.* Harv. Bus. Rev.

The right of a target company to require a hearing provides some check on the State Administrator, but the length and conduct of that hearing are within his control;*

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* New York has had one hearing under its statute (a target company cannot require it to be held) and that hearing lasted only 2 days, but was attended by many shareholders and their representatives. The decision permitting the amended filing was rendered in less than 60 days. Thereafter the Justice Department

(footnote continued on following page)

Baptie undertook to expedite the hearing in this case. The Idaho statute requires that a hearing be held within 20 days and the decision made within 30 of the filing, although the latter limit can be extended by order of the Director. On its face, the Idaho statute does not contemplate a lengthy hearing. This record does not support a finding that the defendants delayed GWU's offer in such a way as to conflict with the Williams Act.

The purposes of the Idaho statute and the Williams Act are the same—to protect investors. *Piper* v. *Chris-Craft Industries,* 430 U.S. 1 (1977). The Court below ignored the holding of this Court in exaggerating Congress' solicitude for the offeror. Congress, like the Idaho legislature, was concerned for the stockholder of the target company. Neither statute sacrifices his interest to either the target company or the offeror. Therefore no impermissible interference with, or conflict between, the statutes exists and the state law should be sustained, *e.g., Jones* v. *Rath Packing Co.,* 430 U.S. 519, 531-32, 543 (1977); *Perez* v. *Campbell,* 402 U.S. 637, 652 (1971); *Castle* v. *Hayes Freight Lines, Inc.,* 348 U.S. 61, 64 (1954); *Franklin Nat'l Bank* v. *New York,* 347 U.S. 373, 378-79 (1954).

D. The Idaho Corporate Takeover Laws Is Valid Under the Supremacy Clause

In *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117 (1973), this Court held (*Id.* at 127):

> "We may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be tempered by the conviction that the proper approach is to reconcile

(footnote continued from preceding page)

obtained litigation stays against the offer on alleged anti-trust grounds, although a preliminary injunction was denied. *United States* v. *United Technologies Corporation* (N.D.N.Y. 78 Cir. 580).

> 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " (Quoting *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 [1963]).

The Court found that there was no conflict between a State statute and a New York Stock Exchange Rule authorized by the Securities Exchange Act of 1934.

The Court below correctly recognized that Congress had not chosen to exclude the states from regulating tender offers, since nothing in the Williams Act Amendments suggest that it was altering the saving clause, § 28 of the 1934 Act, which authorizes State regulation of securities. 577 F.2d at 1275. But in equating differences between the state and federal statutes with an impermissible conflict, the Court of Appeals failed to apply the proper standard as enunciated by this Court in *Florida Lime and Avocado Growers* v. *Paul,* 373 U.S. 132, 142 (1963), in upholding the California Agricultural Code against a claim that it was pre-empted by the Federal Agricultural Marketing Agreement of 1937:

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.
>
> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained."

It is possible that some state statutory provision or administrative action might be found to conflict with the

Williams Act, but the Idaho statute on its face and as administered by appellant McEldowney advanced the purposes of the Congressional legislation.

POINT IV

Idaho has a compelling local interest in insuring the orderly restructuring of a corporation principally located there and in guaranteeing its investors the information necessary to protect themselves. These strong interests outweigh incidental effects on interstate commerce.

The Idaho Corporate Takeover Law affirmatively guarantees equality of treatment for all shareholders in the target company. Idaho Code § 30-1503(5). It makes no distinction between investors within and without the State. Since the law does not discriminate against out-of-state goods or residents, it is not invalid *per se* as a restriction on interstate commerce. Compare *City of Philadelphia* v. *State of New Jersey*, —— U.S. ——, 57 L.Ed. 2d 475 (1978), which invalidated a New Jersey statute prohibiting the importation of out-of-state waste.

Non-discriminatory statutes which burden interstate commerce are governed by this Court's standard announced in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Applying the *Pike* test the Court of Appeals held that the Idaho law interfered with securities transactions throughout the country and might conflict with the laws of other states. These burdens, the Court said, outweighed the

benefit which it found to be a minimal one of protecting resident shareholders. It is the position of the *amici curiae* that the Court of Appeals unjustifiably discounted Idaho's legitimate concern with the governance of corporations operating principally within that state and exaggerated the interference in interstate commerce occasioned by the regulation of tender offers.

A. Idaho's Corporate Takeover Law Vindicates Legitimate Local Public Interest.

The tender offer proposed by GWU would, in one transaction, take control of Sunshine, a corporation whose principal place of business and substantial assets are in Idaho. In the short run, it would leave the majority of shareholders who had owned stock in a widely held corporation as owners of a corporation responsive to one powerful shareholder. In the long run it would make them shareholders of a new corporation, one which was suspicious of disclosing too much about itself and one controlled by a powerful family.

This corporation's assets in Idaho consist largely of real property including the largest silver mine in Idaho or the United States. So this corporation which was being reorganized owned important parts of the State itself, and controlled its precious resources.

This Court has recently recognized the appropriateness of state security laws, even for the benefit of a defeated offeror. (*Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 41 (1977)):

> "Despite the pervasiveness of federal securities regulation, the Court of Appeals concluded in this case that Chris-Craft's complaint would give rise to a cause of action under [state] law principles of interference with a prospective commercial advantage. Although Congress is, of course, free to create a remedial scheme in favor of contestants in tender

offers, we conclude . . . that 'it is entirely appropriate in this instance to relegate [the tender offeror] and others in [that] situation to whatever remedy is created by state law.' "

It also has refused to imply federal causes of action in the traditional state domain of internal corporate affairs. *Sante Fe Industries* v. *Green,* 430 U.S. 462 (1977); *Cort* v. *Ash,* 422 U.S. 66 (1975).

In *Santa Fe Industries,* this Court deferred to Delaware's "short form merger statute", citing language in *Cort* v. *Ash* (*Id.* at 84) which may guide us here:

> "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."

In the face of this permissive federal policy and strong local interest, the Court below nonetheless found that only Congress could regulate this commerce. It suggested that the Idaho defendants' actions were to advance chauvinistic protection of incumbent management and to prevent the removal of local business to other states (577 F.2d at 1282). But neither of those findings is justified. Incumbent Sunshine management had no champion in Idaho officials p. 58 *supra.* Certainly no Idahoan feared the removal of the target Company's operations from that State. Even the wealth and power of the Hunts could not move the Sunshine Mine to Texas. Idaho's interest was just what it had asserted—to provide information and the opportunity to use it to the owners of Sunshine. Its purpose was to insure the orderly restructuring of the company and to protect the rights of those owners, Sunshine's shareholders.

The Court below erred in measuring Idaho's interest by the number of shareholders residing there. While the

Idaho Legislature could reasonably expect a concentration of a corporation's shareholders to be located within its borders if the corporation had its principal place of business in Idaho, the focus of its local interest is the corporation. Its concern for this Idaho corporation reflects itself in protection of its shareholders in tender offer transactions where their ownership of the corporation is at stake. Idaho's law guarantees that all shareholders, wherever they reside, will be equally protected.

The Court below failed to appreciate Idaho's solicitude for the owners of its local industry because it wrongly believed (577 F.2d at 1280, n. 53):

> ". . . a tender offer involves the sale of securities from one shareholder to another, not a change in the corporation itself."

It also did not recognize that federal and state laws protected the shareholder of the target corporation, whether or not he decides to tender all or part of his stock or whether he receives it back because of proration. See Chairman Cohen, Senate Hearings 206. The Court wrongly believed that only the tendering shareholder deserved consideration (577 F.2d 1280, n. 53):

> "Although a tender offer can be a substitute for a proxy contest, there are important distinctions between the two. In a proxy contest the existing shareholder transfers only his vote; the other aspects of his existing relationship with the corporation remain. A tendering shareholder severs the existing relationship completely."

The Court of Appeals even suggested that disclosure might be harmful to interstate commerce, by "confusing" the shareholder. 577 F.2d at 1268. In light of the Williams Act that was impermissible speculation.

Idaho has demonstrated a compelling local interest in the restructuring of Sunshine. This interest is based on the

actual location of Sunshine, not its place of incorporation. Sunshine is "a pseudo-foreign corporation" to Idaho. See Kaplan, *Foreign Corporations and Local Corporate Policy,* 21 Vand. L. Rev. 433 (1968); Latty, *Pseudo-Foreign Corporations,* 65 Yale L.J. 137 (1955). One major advantage of this jurisdictional base in the area of tender offers is that incumbent management cannot choose a state to protect it from a takeover bid as it might have if those bids were governed exclusively by the State of incorporation.

B. The Idaho Corporate Takeover Law Has Only An Incidental Effect On Inter-State Commerce.

Exercising jurisdiction over the corporation actually located in the state and treating all Sunshine shareholders equally, Idaho law will affect Sunshine shareholders tendering their shares to the offeror, even if those shareholders reside elsewhere. That is the necessary ancillary effect of vindicating a legitimate local concern. This Court has upheld the extraterritorial application of Virginia's Blue Sky Laws to the issuance of insurance policies on those grounds. *Travelers Health Association* v. *Virginia,* 339 U.S. 643 (1950).

The condemnation by the Court below of the alleged extraterritorial effect of Idaho's Corporate Takeover Law was answered eloquently by the then Judge Cardozo in 1915 in applying a New York law permitting recovery by a corporation of illegal dividends by its Board of Directors. The place of incorporation was New Jersey, but its main business was in New York. Judge Cardozo held that New York law governed the payment of dividends to out-of-state shareholders without offending the Commerce Clause (*German-American Coffee* v. *Diehl,* 216 N.Y. 57, 64):

> "This statute makes no attempt to regulate foreign corporations while they keep within their domicile. It is aimed against them only while they elect to live within our borders. The duty which it imposes arises only when they come to us, and ends the moment that they leave us. Such a statute, however phrased, is in effect a condition on which the right to do business within the state depends. . . .
>
> "If they take the corporation out of the state, they may declare dividends as they please. If they elect to keep it with us, they must not lead it into paths of ruin. In these days, when countless corporations, organized on paper in neighboring states, live and move and have their being in New York, a sound public policy demands that our legislature be invested with this measure of control. If the control is irksome, it may be avoided by leaving us. Even if the prohibited act is done in the home state, it may be bound up in its results with the business in this state that we cannot view it with indifference."

Because of different state jurisdictional bases and because certain corporations could have a dominant presence in more than one state, it is possible that more than one state might invoke jurisdiction over a tender offer. However, there is every reason to expect that there would be cooperation in acceding to the authority of the State most concerned (WHEAT T 311, 5/24/77).

There has not yet been an instance where more than one state has stayed an offer, held a hearing or affirmatively proceeded where another state had acted. The suggestion that three states governed this offer was GWU's, alone. It was a transparent litigation device to bolster its Commerce Clause claims and to avoid disclosure of its finances. However from the first, the officials of New York and Maryland cooperated completely in defending Idaho's jurisdiction. They evaluated Idaho's statute and administrative action and determined that the investors' interests were being protected, even if they had jurisdiction.

Where the interstate effect was ancillary and beneficial this Court upheld a Maryland law creating a bounty for auto bodies to be paid to scrap processors in the state.

Hughes v. *Alexandria Scrap Co.*, 426 U.S. 794, 808-809 (1976). Here too, the ancillary and beneficial effects on non-residents and speculation as to possible conflict among the states is outweighed by Idaho's legitimate local public interests in regulating the dramatic restructuring of a local corporation by means of a tender offer and in protecting its shareholders.

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the complaint dismissed.

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Respectfully submitted,

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